No. _____

Supreme Court, U.S.
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In the

Supreme Court of the United States

R. JAY DROLETT,

Petitioner,

v.

EDWARD J. DEMARCO, JR.; RICHARD SHERMAN; LINDA SINISGALLO; MARK SIMMONS; LORRAINE DEVANNEY; JAMES BARTON AND TOWN OF EAST WINDSOR,

Respondents.

On Petition for Writ of Certiorari
to the U.S. Court of Appeals
for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

Kathleen Eldergill
Counsel of Record
BECK & ELDERGILL, PC
447 Center Street
Manchester, CT 06040
(860) 646-5606
keldergill@beckeldergill.com

Counsel for Petitioner

*Gibson*Moore Appellate Services, LLC
421 East Franklin Street • Suite 230 • Richmond, VA 23219
804-249-7770 • www.gibsonmoore.net

Questions Presented

1. Does *Garcetti v. Ceballos*, 547 U.S. 410 (2006), permit government officials to punish off-duty communications made outside the chain of command because the subject matter of such speech touches on issues related to the employee's official duties?

2. Does an appellate court lack jurisdiction over an interlocutory appeal of qualified immunity, where the trial court finds disputed issues of material fact relevant to the issue of whether reasonable government officials should have known their actions violated clearly established Constitutional rights?

Parties to the Proceeding

The Petitioner is R. Jay Drolett.

The Respondents are: Edward J. DeMarco, Jr., Police Chief of the Town of East Windsor, Connecticut; Richard U. Sherman, Linda Sinsigallo, Mark Simmons, Lorraine DeVanney and James Barton, present or former members of the Town of East Windsor Police Commission and the Town of East Windsor.

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Petition for Writ of Certiorari

Petitioner asks this Court to issue a Writ of Certiorari to review the final judgment of the United States Court of Appeals for the Second Circuit in two respects:

1. This case gives the Court the opportunity to address a conflict in the Circuits concerning the proper analysis and inquiry to be used in determining what conduct falls within the scope of "official duties" under *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951 (2006).

2. The Second Circuit Court of Appeals lacked jurisdiction to hear this interlocutory appeal of qualified immunity, as the trial court found disputed issues of material fact relevant to the issue of whether the law was clearly established at the time the government officials acted to punish Petitioner's speech. The Circuit Court's decision to the contrary conflicts with precedent of this Court and of other Circuit Courts of Appeals.

Opinion and Judgment Below

The District Court's opinion denying summary judgment is unofficially reported at 2007 WL 1851102 and is reprinted in the Appendix at App. 6a. The summary order of the Second Circuit Court of Appeals reversing the District Court's denial of summary judgment on qualified immunity grounds is reported at 382 Fed. Appx. 7 and at 2010 WL 2465542, and is reprinted in the Appendix at App. 1a. The order of the Second Circuit Court of Appeals denying the petition for panel rehearing, or, in the

alternative, for rehearing *en banc* is unreported and is reprinted in the appendix at App. 34a.

Statement of Jurisdiction

The District Court had jurisdiction under 28 U.S.C. § 1331. The decision of the United States Court of Appeals for the Second Circuit, reversing the trial court's denial of summary judgment on qualified immunity grounds was issued June 16, 2010. A timely petition for panel rehearing or, in the alternative for rehearing *en banc* was denied August 20, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Statutory and Constitutional Provisions Involved

The First Amendment to the United States Constitution, provides, in relevant part: "Congress shall make no law . . . abridging the freedom of speech."

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State. . .subjects, or causes to be subjected, any citizen of the United States. . .to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . ."

Statement of the Case

Introduction

The Petitioner, a resident and taxpayer of the Town of East Windsor, Connecticut, sent an anonymous letter to his Town's Police Commission, First Selectman and to the press, communicating concerns about police department staffing, training and mismanagement of resources and personnel. Although Petitioner did all that he could do disassociate himself from his role as a Town police officer in making this communication, writing and sending the letter while off-duty and intentionally omitting his name from the document so that he would not be identified as a police officer, he was disciplined by Respondents for this speech. The Second Circuit Court of Appeals then relied on *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006) to conclude that Respondents' discipline of Petitioner did not violate a clearly established constitutional right, without deciding whether or not Petitioner's constitutional rights were violated in this case.

When *Garcetti* announced that "the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities," this Court had no reason to establish a comprehensive framework for determining when an action falls within an employee's official duties, since the issue was not in dispute in that case. *Id.* at 424-25. Since *Garcetti*, every Court of Appeals has weighed in on this issue, applying principles gleaned from *Garcetti* to this fact-based inquiry. As of this date, the Circuit

Courts of Appeals are divided in their determination of this issue. One line of cases holds that speech is made "pursuant to official duties" when that speech is made within the employee's chain of command, while a second line of cases, without reference to communication channels or audience, focuses on the nature and scope of an employee's duties and holds speech unprotected when it is required to be made or when it expresses employee concerns about proper execution of job duties. (See discussion in Section I.A., *infra.)* The instant case, which presents speech clearly outside the chain of command but concerning subject matter related to Petitioner's job duties, affords this Court an opportunity to resolve this conflict in the Circuits and to provide much needed guidance to the Courts of Appeals.

In addition, the Second Circuit opinion reflects a departure from the precedent of this Court and of other Courts of Appeals in affording interlocutory review to qualified immunity issues which turn on disputed issues of material fact.

Facts of the Case

The Petitioner, R. Jay. Drolett ("Drolett"), a resident and taxpayer of the Town of East Windsor, sent an anonymous letter to members of the East Windsor Police Commission, the First Selectman and a local newspaper, communicating concerns about police department staffing, training and mismanagement of resources and personnel. (Ruling on Defendants' Motion for Summary Judgment dated June 26, 2007 ["Decision"] at 4-5, App. 10a-11a.) Drolett, who was a taxpayer and businessman

who resided in the Town of East Windsor, wrote his letter because he believed, based on discussions with those in the community, that mismanagement and waste in the East Windsor Police Department ("EWPD") were having a negative impact on the Town. (Affidavit of R. Jay Drolett ["Drolett Aff."], para. 21, App. 46a-47a.) Drolett, who had worked for the EWPD for 25 years, intentionally left his name off of the letter so that it would not be associated with him in his capacity as a police officer. (Drolett Aff., paras. 1-4, 10, 21; App. 39a-40a, 42a, 46a-47a).

Prior to authoring his anonymous letter, Drolett repeatedly attempted, both verbally and in writing, to discuss the issues identified in his letter with his superiors through the chain of command. Those efforts, however, were unsuccessful. (Drolett Aff., paras. 11-20, App. 43a-46a.)

Respondents authorized an internal investigation to determine the identity of the letter's author. When Drolett was questioned, he admitted that he had written and sent the letter as an East Windsor resident. (Decision at App. 12a.) Respondents suspended Drolett for ten days without pay and placed him on probation for six months for writing and sending the letter, claiming that this communication violated Department policies because he "consciously chose to ignore this department's chain of command" in communicating about police department matters. (Decision at App. 12a.)

Proceedings Below

Drolett filed suit against the Town of East Windsor, Chief of Police Edward J. DeMarco, Jr. and members of the East Windsor Police Commission, Richard U. Sherman, Linda Sinsigallo, Mark Simmons, Lorraine DeVanney and James Barton, alleging that he was disciplined in violation of his First Amendment rights. Respondents filed a motion for summary judgment which included claims that the individual Respondents were entitled to qualified immunity. (Motion for Summary Judgment dated December 29, 2006, App. at 37a.) In denying Respondents' motion for summary judgment, the District Court concluded that there existed "genuine issues of material fact as to whether Drolett was acting pursuant to his official duties when he sent his letter to the Police Commission and local press." (Decision at App. 16a.)

In reaching this conclusion, the District Court set forth specific facts and inferences drawn from the record, including the fact that Drolett had informed his superiors that he had written and sent the letter in his capacity as an East Windsor resident, rather than as a police officer. (Decision at App. at 12a, 20a.) Respondents contended that the EWPD "chain of command" policies applied to Drolett's anonymous letter, even though Drolett's off-duty communication to the Police Commission was made, according to Drolett, in his capacity as a taxpayer, resident and citizen. (Decision at App. 20a, 25a.) The trial court also found no evidence in the record that Drolett's official duties included "complaining about all kinds of workplace management, regardless of the context

in which these complaints were made." (Decision at App. 16a.) Finally, the court found that the EWPD rules did not require Drolett to make complaints but only permitted him to do so; that is, there was no evidence that he was employed specifically to make such reports. (Decision at App. 17a.)

In denying summary judgment based on qualified immunity, the District Court found that "the context in which this letter was sent - anonymously and to the Commission as well as a local politician and newspaper - and the contents of the statements themselves, indicate that the letter was not written in Drolett's capacity as a Police Officer. Thus, it would not have been objectively reasonable for the Defendants to believe that Drolett's letter was not a matter of public concern or that they could discipline him because of having sent it." (Decision at App. 32a.)

The individual Respondents filed an interlocutory appeal based on the District Court's denial of summary judgment on qualified immunity. In addition to opposing the merits of the appeal, Petitioner challenged the Court of Appeals' jurisdiction, because the District Court's ruling on qualified immunity depended upon the existence of disputed issues of material fact.

On appeal, the Second Circuit Court of Appeals issued a Summary Order reversing the District Court's ruling, and dismissing Drolett's claims against the individual Respondents. (Summary Order at App. 3a.) Without deciding whether or not Petitioner's Constitutional rights were violated, the

Second Circuit considered the issue of whether or not the right at issue was "clearly established" at the time the officials' misconduct occurred. See *Pearson v. Callahan*, ___ U.S. ___, 129 S. Ct. 808, 818 (2009).

In determining that Drolett's rights were not clearly established, the court assumed, first of all, that if Drolett had raised his concerns within the chain of command, "that speech likely would have been made 'pursuant to [his] official duties and therefore not protected by the First Amendment", relying upon *Garcetti*, 547 U.S. at 421. (Summary Order at App. 4a.) Based on this assumption, the Court held:

> The courts have yet to consider whether speech that would not enjoy First Amendment protection if made pursuant to an official duty can claim such protection when made in violation of that duty. We therefore conclude that even if the actions of defendants did violate Drolett"s First Amendment rights, those rights were not clearly established at the time of the discipline. Accordingly, we conclude that defendants are entitled to qualified immunity.

(Summary Order at App. 4a.)

Petitioner filed a timely combined petition for panel rehearing and rehearing *en banc*, which was denied. This Petition followed.

Reasons for Granting the Petition

QUESTION I:

Does *Garcetti v. Ceballos*, 547 U.S. 410 (2006), permit government officials to punish off-duty communications made outside the chain of command because the subject matter of such speech touches on issues related to the employee's official duties?

A. There exists a conflict in the Circuits.

Since *Garcetti v. Ceballos*, 547 U.S. 410 (2006) was decided by this Court, every Court of Appeals has had occasion to undertake what is essentially a fact-based inquiry in order to determine whether employee speech was made "pursuant to official duties." See, *e.g.*, *Foley v. Town of Randolph*, 598 F.3d 1 (1st Cir. 2010); *Huth v. Haslun*, 598 F.3d 70 (2d Cir. 2010); *Foraker v. Chaffinch*, 501 F.3d 231 (3d Cir. 2007); *Andrew v. Clark*, 561 F.3d 261 (4th Cir. 2009); *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689 (5th Cir. 2007); *Haynes v. City of Circleville, Ohio*, 474 F.3d 357 (6th Cir. 2007); *Mills v. City of Evansville, Ind.*, 452 F.3d 646 (7th Cir. 2006); *Lindsey v. City of Orrick*, 491 F.3d 892 (8th Cir. 2007); *Marable v. Nitchman*, 511 F.3d 924 (9th Cir. 2007); *Casey v. West Las Vegas Independent School Dist.*, 473 F.3d 1323 (10th Cir. 2007); *Battle v. Board of Regents for Georgia*, 468 F.3d 755 (11th Cir. 2006); *Winder v. Erste*, 566 F.3d 209 (D.C. Cir. 2009).

As of this date, the Courts of Appeals are divided in their approach, as two conflicting lines of case law have developed. The Fifth, Sixth, Seventh and Tenth

Circuit Courts of Appeals have focused on the channel of communication selected by the employee and the audience to whom the message is communicated in determining whether speech is made "pursuant to official duties." Thus, the Fifth and Sixth Circuits have held, as a matter of law, that statements made about the workplace, when raised through the "chain of command" must be considered speech made as an employee, rather than as a citizen. See *Davis v. McKinney*, 518 F.3d 304, 313 (5th Cir. 2008) ("[c]ases from other circuits are consistent in holding that when a public employee raises complaints or concerns up the chain of command at his workplace about his job duties, that speech is undertaken in the course of performing his job"); cited with approval by *Fox v. Traverse City Area Public Schools Bd. of Educ.*, 605 F.3d 345, 349-350 (6th Cir. 2010). See also *Mills v. City of Evansville, Ind.*, 452 F.3d 646, 648 (7th Cir. 2006)(plaintiff speaking as an employee where she was on duty, in uniform, and engaged in discussion with her superiors); *Haynes v. City of Circleville, Ohio*, 474 F.3d 357, 364 (6th Cir. 2007)(Haynes communicated solely to his superior); *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689 (5th Cir. 2007)(Plaintiff athletic director wrote memo to his school principal and office manager).

Under this line of analysis Courts of Appeals have held communications made within the chain of command unprotected, while the same subject matter, communicated to outside agencies, elected officials or members of the public are afforded protection. See, *e.g.*, *Casey v. West Las Vegas*

Independent School Dist., 473 F.3d 1323 (10th Cir. 2007) (communications to Attorney General protected, while those to supervisors were not); *Brammer-Hoelter v. Twin Peaks Charter Academy*, 492 F.3d 1192, 1204-1205 (10th Cir. 2007)(communications outside of the workplace, after hours, to "ordinary citizens and parents" beyond scope of official duties). See also *Morales v. Jones*, 494 F.3d 590, 598 (7th Cir. 2007)(conversation with supervisor unprotected while deposition testimony on same subject was protected). The Seventh Circuit, in *Morales*, stated:

> We recognize the oddity of a constitutional ruling in which speech said to one individual may be protected under the First Amendment, while precisely the same speech said to another individual is not protected. Indeed, this is exactly the concern that Justice Stevens voiced in his dissent in *Garcetti:* "[I]t is senseless to let constitutional protection for exactly the same words hinge on whether they fall within a job description." 126 S. Ct. at 1963. Despite Justice Stevens' admonishment, Garcetti established just such a framework, and we are obliged to apply it.

494 F.3d at 598.

In contrast, the First, Second, Third, Fourth, Eighth, Ninth and D.C. Circuit Courts of Appeals have focused not on the speaker's channel of communication or audience, but rather on the nature and scope of the employee's job responsibilities, in deciding whether or not speech was "pursuant to" an

employee's official job duties. Some of the Circuits ask whether or not the speech is *required* to be made as part of the employee's job. Thus, in *Foraker v. Chaffinch*, 501 F.3d 231 (3d Cir. 2007), the plaintiffs' speech was held unprotected because they were required to report problems at a firing range up the chain of command and because they were ordered to make a report on this topic to a state auditor. *Id.* at 241-243. In *Lindsey v. City of Orrick*, 491 F.3d 892 (8th Cir. 2007), the court employed this same standard to reach a contrary result. Lindsey was a public works director responsible for maintaining the city's parks, water systems, streets and sewers who was fired because he questioned the City Council's compliance with the state's "Sunshine Law" requiring open meetings. Because Lindsey's job duties did not include responsibility for Sunshine Law compliance, his speech was not *required* by his job, not made pursuant to his official duties, and therefore protected. *Id.* at 898, 900.

Similar reasoning was followed by the Ninth Circuit in *Marable v. Nitchman*, 511 F.3d 924, 932-933 (9th Cir. 2007). In that case, the court held that an engineer "had no official duty to ensure that his supervisors were refraining from . . .corrupt practices", rejecting reliance on broad language in training manuals requiring him to"[k]now and enforce all applicable federal and state rules and regulations." And in *Andrew v. Clark*, 561 F.3d 261, 267-268 (4th Cir. 2009), the plaintiff was a major in the Baltimore Police Department when he wrote a memo to the Police Commissioner seeking an investigation concerning a police shooting. In

rejecting defendants' qualified immunity defense under *Garcetti,* the Fourth Circuit held that there existed a question of fact as to whether or not Andrew had a duty to write the memorandum as part of his official responsibilities. 561 F.3d at 264.

Other Circuit Courts, while focusing on employees' job responsibilities, have defined unprotected speech more broadly than "required" speech. Thus, in *Foley v. Town of Randolph,* 598 F.3d 1, 6-8 (1st Cir. 2010), the Chief of the Fire Department, attending a press conference convened by the state fire marshal at the scene of a fatal fire, while in uniform and on duty voluntarily spoke about issues related to the budget and staffing of his Department. The court concluded that under such circumstances, his speech was unprotected: "Foley addressed the media in his official capacity, as Chief of the Fire Department, at a forum to which he had access because of his position." 598 F.3d at 7.

Similarly, the D.C. Circuit Court of Appeals, in considering the speech of high-level employees has "consistently held that a public employee speaks without First Amendment protection when he reports conduct that interferes with his job responsibilities, even if the report is made outside his chain of command." *Winder v. Erste,* 566 F.3d 209, 215 (D.C. Cir. 2009). See also *Battle v. Board of Regents for Georgia,* 468 F.3d 755, 761 (11th Cir. 2006)(plaintiff had an obligation to disclose fraud to University officials). See also *Huth v. Haslun,* 598 F.3d 70, 74 (2d Cir. 2010)("speech can be 'pursuant to' a public employee's official job duties even though it was not required by, or included in, the employee's

job description, or in response to a request by the employer" as long as that speech was "part-and-parcel of [the employee's] concerns about his ability to properly execute his duties.").

Commentators have recognized these divergent analyses, as well as the fact that they can produce different outcomes when applied to the same set of facts. See, *e.g.*, Tyler Wiese, *Seeing Through The Smoke: "Official Duties" in the wake of Garcetti v. Ceballos*, 25 ABA Journal of Labor & Employment Law 509 (2010); Elizabeth Dale, *Employee Speech and Management Rights: a Counterintuitive Reading of Garcetti v. Ceballos*, 29 Burkley J. Emp. & Lab. L. 175 (2008), at pp. 196-207.

B. The facts of this case, as well as the nature of the Second Circuit's ruling, make it appropriate for review on this question.

Because the facts of this case are simple and straightforward insofar as they are relevant to the *Garcetti* issue, the case is particularly appropriate as a vehicle to resolve the conflict in the Circuits described above. It is undisputed that Petitioner Drolett took all steps available to him in an effort to ensure that his letter would not be attributed to him in his capacity as a Town police officer: the communication was written and sent while Drolett was off duty and he intentionally omitted his name from the letter, revealing it only when he was ordered to do so. Nonetheless, solely because his communication discussed "police matters" he was disciplined by his superiors and the Second Circuit

held that such discipline did not violate Drolett's clearly established Constitutional rights.

While it is true that the Second Circuit chose to bypass the issue of whether or not the individual Respondents violated Petitioner's Constitutional rights, and move instead to the second prong of qualified immunity analysis by asking whether or not Petitioner's rights were clearly established (see Summary Order at App. 4a), this does not insulate the underlying constitutional question from review. This Court has previously held that to the extent the question of qualified immunity presents a "pure issue of law" it is appropriate for this Court's immediate resolution without the need to remand to the Court of Appeals for decision on the merits. *See Mitchell v. Forsyth,* 472 U.S. 511, 530 (1985)(purely legal question of immunity is appropriate for immediate resolution by Supreme Court, although it was not addressed by the Court of Appeals). To the extent this Court deems this issue to be a matter of law, and therefore properly the subject of an interlocutory appeal, it can and should be decided now.

The Second Circuit's opinion implicitly assumes that *Garcetti*, in addition to limiting protection for speech made pursuant to official duties, otherwise changed First Amendment jurisprudence, such that the contours of Petitioner's rights, which would have been clear before *Garcetti*, have since become muddled. Although Second Circuit precedent predating *Garcetti* made it clear that speech made outside the chain of command has long been entitled to First Amendment protection, see *Frank v. Relin,*

1 F.3d 1317, 1330 (2d Cir. 1993); *Skehan v. Village of Mamaroneck*, 465 F.3d 96, 102, 104-05, 107 (2d Cir. 2006), overruled on other grounds by *Appel v. Spiridon*, 531 F.3d 138, 140 (2d Cir. 2008); *Harman v. City of New York*, 140 F.3d 111, 120-121, 124 (2d Cir. 1998), the court's opinion below now claims the right to speak outside the chain of command needs to be reconsidered, since speech made within the chain of command would be unprotected after *Garcetti*. (Summary Order at App. 4a.)

The assumption that *Garcetti* narrowed the First Amendment rights of employees beyond its holding has appeared as the underpinning in other decisions of the Second Circuit Court of Appeals and has been criticized by members of that Court. See, *e.g.*, *Weintraub v. Board of Educ. of City School Dist. of City of New York*, 593 F.3d 196, 205 (2d Cir. 2010)(Calabresi, J., dissenting)("I do not share the majority's belief that the Supreme Court " 'narrowed [its] jurisprudence in the area of employee speech' " in *Garcetti*. Maj. Op. at 201. . . Garcetti did not overturn or even call into question any of the Court's prior precedents on employee speech; indeed, it specifically reaffirmed or cited approvingly many of the precedents that the majority opinion suggests were "narrowed." See, e.g., *Garcetti*, 547 U.S. at 417, 419, 420, 126 S. Ct. 1951.")

A view identical to that expressed by the dissent in *Weintraub* was adopted by the Fourth Circuit Court of Appeals in *Andrew v. Clark*, 561 F.3d 261 (4th Cir. 2009), which reversed the district court's grant of summary judgment to Defendants. In so doing, the Fourth Circuit stated: "The district

court. . .stated that Garcetti had 'significantly modif[ied] the longstanding test of public employee First Amendment protection derived in *Pickering v. Board. of Educ.*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811[ ](1968).' *Andrew* [*v. Clark*], 472 F. Supp. 2d [659] at 661 [(D. Md. 2007)] . . .We disagree." 561 F.3d at 267-268 (noting that *Garcetti* expressly reaffirmed *Pickering*, quoting *Garcetti*, 547 U.S. at 418).

The divergent, contrasting views on the proper scope of *Garcetti* ruling, set out by the Fourth Circuit in *Andrews v. Clark, supra*, and relied upon by the Second Circuit in this case as well as other decisions it has issued, make this case an appropriate one for review.

C. Resolution of the proper scope of *Garcetti* affects the First Amendment rights of many citizens.

The Second Circuit opinion below, under which an employee subject to "chain of command" restrictions can be punished for any speech which pertains to his workplace, regardless of time, place and manner of expression, means that such an employee will *never* be permitted to speak "as a citizen" on such subject matter–a result at odds with this Court's ruling in *Garcetti*. The restriction imposed by *Garcetti*, according to this Court, "relates only to the expressions an employee makes pursuant to his or her official responsibilities, not to statements or complaints (such as those at issue in cases like *Pickering* [*v. Board of Educ.*, 391 U.S. 563, 572, 88 S. Ct. 1731, 1737 (1968)] and *Connick* [*v.*

Myers, 461 U.S. 138, 142, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983)]) that are made outside the duties of employment." *Garcetti, supra*, 547 U.S. at 424. Yet, as noted above, the Second Circuit has, in this case, expanded the reach of *Garcetti* far beyond its holding.

The broad proscription of the Second Circuit Court of Appeals, permitting punishment of off duty speech, in spite of the employee's affirmative efforts to distance his communication from his role as an employee, so that he can speak as a citizen, has a significant impact not only on Petitioner Drolett, but on all citizens who make their living as public employees, as well as members of the public with a right to know about the operations of their public offices.

According to information gathered by the United States Census Bureau, state and local governments in the United States employed 16.6 million full-time workers and 4.7 million part-time workers during 2009. *2009 Annual Survey of State and Local Government Employment and Payroll*; United States Census Bureau (March 2009). Of those, over 2 million worked in law enforcement (police departments, fire departments and correctional facilities)(*id.*), holding positions in organizations most often characterized by "chain of command" policies. Under the Court of Appeals ruling in this case, such employees are rendered unable, as a matter of law, to "make public statements outside the course of performing their official duties", even if they do so in the same time, place and manner as "citizens who do not work for the government." See

Garcetti, supra, 547 U.S. at 423. The ruling below, which is surely one of the most extreme in a line of decisions interpreting *Garcetti* more and more broadly, veers off-course from the intentions expressed in *Garcetti* and requires review and correction by this Court.

QUESTION II:

Does an appellate court lack jurisdiction over an interlocutory appeal of qualified immunity, where the trial court finds disputed issues of material fact relevant to the issue of whether reasonable government officials should have known their actions violated clearly established Constitutional rights?

A. Appellate review of qualified immunity determinations is limited.

Where defendants move for summary judgment on qualified immunity grounds, and the trial court denies the motion because there exist genuine issues of material fact in dispute, defendants are not entitled to interlocutory review. *Johnson v. Jones*, 515 U.S. 304 (1995). Summary judgment determinations are appealable only when they turn on an abstract issue of law such as whether the federal right allegedly infringed was clearly established. *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996). Thus, after *Johnson* and *Behrens* an interlocutory appeal can be taken on the issue of qualified immunity only where the government official argues "that all of the conduct which the District Court deemed sufficiently supported for purposes of summary judgment met the ... standard

of 'objective legal reasonableness.'" *Behrens*, *supra*, 516 U.S. at 313.

A determination as to whether defendants violated a "clearly established" Constitutional right requires a fact-specific inquiry in order to determine whether a reasonable government official could have believed his actions to be lawful in light of clearly established law and the information he possessed at the time he acted. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). To the extent an appellate court ascertains that the trial court's findings in its ruling on summary judgment fail to adequately describe "certain given facts" for the purpose of determining whether there exists a violation of "clearly established" law, see *Johnson v. Jones*, 515 U.S. at 311, the proper course of action is to remand the case for additional findings of fact to the District Court. *Harlow v. Fitzgerald*, 457 U.S. 800, 819-20 (1982)("We think it appropriate ... to remand the case to the District Court for its reconsideration of this issue in light of this opinion. The trial court is more familiar with the record so far developed and also is better situated to make any such further findings as may be necessary")(footnote omitted); *Hill v. Taconic Developmental Disabilities Services Office*, 57 Fed. Appx. 9, 11, 2003 WL 25872285, 2 (2d Cir. 2002); *Grant v. City of Pittsburgh*, 98 F.3d 116, 123 (3d Cir. 1996); *Hare v. City of Corinth, Mississippi*, 74 F.3d 633, 638 (5th Cir. 1996)(en banc).

B. The Second Circuit had no jurisdiction to hear this appeal.

In the present case, the trial court expressly found "there are genuine issues of material fact as to whether Drolett was acting pursuant to his official duties when he sent his letter to the Police Commission and local press." More specifically, although Respondents claimed that "Drolett was discharging his police officer's duty to report by reporting these matters, even though in violation of the established chain of command," Petitioner argued "that the aforementioned provision of the Police Manual applies only to Police Department employees 'who are acting in the course of performing their police duties' and thus is inapplicable in his situation, where he was communicating to the Police Commission as a 'taxpayer, resident and citizen.'" (Decision at App. 15a-16a.) The trial court further stated, "Here, there is no evidence that Drolett's official duties included complaining about all kinds of workplace management, whatever the context in which these complaints were made . . . The court does not construe the Police Department's rules to require Drolett to make complaints, but only to permit him to do so - that is, there is no evidence that he was employed specifically to make such reports." (Decision at App. 16a-17a) (emphasis in original).

Notwithstanding the trial court's ruling that factual disputes precluded a resolution of the qualified immunity issue, the Second Circit Court of Appeals, without commenting on these findings, without remanding to the District Court for

additional findings and without undertaking any independent review of the record, reversed the District Court's finding on qualified immunity, holding that the Petitioner's Constitutional rights were not "clearly established." (Summary Order at App. 4a.) In so doing, the Second Circuit improperly considered the issue of qualified immunity in an interlocutory appeal.

This decision is at odds with the prior decisions of this Court, see *Johnson* and *Behrens, supra,* as well with decisions of other Circuit Courts of Appeals. See, *e.g.*, *Posey v. Lake Pend Oreille School Dist. No. 84,* 546 F.3d 1121, 1124 (9th Cir. 2008) (issue of fact precluded summary judgment where employee wrote letter at home on his own time and where a factual dispute existed as to whether he was required to report security issues to his superiors). *Accord, Andrew v. Clark,* 561 F.3d 261 (4th Cir. 2009), reversing 472 F. Supp. 2d 659 (D. Md. 2007) "because the parties do not agree that the facts demonstrate that Andrew wrote his memorandum as part of his official duties." *Id.* at 267. For that reason, this matter requires review and reversal by this Court.

Conclusion

The petition for writ of certiorari should be granted

Petitioner's Counsel of Record

/s/ Kathleen Eldergill
Kathleen Eldergill
Counsel of Record
Beck & Eldergill, P.C.
447 Center Street
Manchester, CT 06040
Tel: (860) 646-5606
Email: keldergill@beckeldergill.com

Entered: June 16, 2010

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this court's Local Rule 32.1.1. When citing a summary order in a document filed with this court, a parry must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A parry citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 16'h day of June, two thousand ten.

Present: JOSE A. CABRANES,
REENA RAGGI,
PETER W. HALL,
Circuit Judges.

No.07-3221-cv

R. JAY DROLETT,
Plaintiff-Appellee,

v.

EDWARD J. DEMARCO,JR., RICHARD SHERMAN, LINDA SINISGALLO, MARK SIMMONS, LORRAINE DEVANNEY,JAMES BARTON AND TOWN OF EAST WINDSOR,
Defendants-Appellants.

FOR APPELLEE: MARC P. MERCIER (Kathleen Eldergill, *on the brief),* Beck & Eldergill, P.C., Manchester, CT.

FOR APPELLANT: JOSHUA A. HAWKS-LADDS, Pullman & Comley, LLC (Scott M. Karsten, Karsten, Dorman, & Tallberg, *on the brief)* Hartford, CT.

Appeal from an order of the United States District Court for the District of Connecticut Janet C. Hall, *Judge).*

UPON DUE CONSIDERATION IT IS HEREBY ORDERED, ADJUDGED, AND DECREED the order of the District Court is **REVERSED.**

Defendants Edward J. DeMarco, Jr., Richard Sherman, Linda Sinisgallo, Lorraine DeVanney, James Barton, Town of East Windsor, and Mark Simmons (collectively, "defendants") appeal from a June 26, 2007 order of the District Court denying their motion for summary judgment on the basis of qualified immunity. We assume the parties' familiarity with the facts and procedural history of this case.

Under the collateral order doctrine, we have jurisdiction to review a denial of qualified immunity "to the extent that the district court has denied the motion as a matter of law." *O'Berl ex rel. Estate of O'Bert v. Valgo,* 331 F.3d 29, 38 (2d Cir. 2003). We review the District Court's denial of qualified immunity *de novo. See Arlio v. Lively,* 474 F.3d 46, 51 (2d Cir. 2007).

In deciding whether to grant a government official's motion for summary judgment on qualified immunity grounds, we first consider whether the official's conduct violated a constitutional right. *See Gilles v. Repicky,* 511 F.3d 239, 244 (2d Cir. 2007). If a plaintiffs rights were violated, we then decide whether the right at issue was "clearly established" at the time of the official's alleged misconduct. *See Pearson v. Callahan,* 129 S. Ct. 808, 818 (2009). "If the conduct did not violate a clearly established constitutional right, or if it was objectively reasonable for the [official] to believe that his conduct did not violate such a right, then the

[official] is protected by qualified immunity." *Gilles*, 511 F.3d at 244. In determining if qualified immunity should be granted, we may consider first either step of the two step inquiry. *See Pearson*, 129 S. Ct. at 821 *(abrogating in part Saucier v. Kat*, 533 U.S. 194 (2001)).

Here, we move immediately to the second step of the qualified immunity analysis. We therefore consider whether plaintiffs rights were "clearly established" at the time defendants disciplined Drolett. In *Garcetti v. Ceballos*, the Supreme Court held that speech of a public employee is not protected by the First Amendment if that speech was made pursuant to the employee's official duties. 547 U.S. 410, 421 (2006). Here, though Drolett had a duty to raise his concerns about the management of the police department within the chain of command, he did not do so. Instead, he raised his concerns outside the chain of command. Had Drolett raised his concerns within the chain of command, that speech likely would have been made "pursuant to [his] official duties," and therefore not protected by the First Amendment. *See Garcetti*, 547 U.S. at 421. The courts have yet to consider whether speech that would not enjoy First Amendment protection if made pursuant to an official duty can claim such protection when made in violation of that duty. We therefore conclude that even if the actions of defendants did violate Drolett's First Amendment rights, those rights were not clearly established at the time of the discipline. Accordingly, we conclude that defendants are entitled to qualified immunity.

CONCLUSION

For the reasons stated above, the June 22, 2007 order of the District Court is **REVERSED** and the cause is **REMANDED** to the District Court for the entry of Judgment in favor of defendants.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

Entered: June 26, 2007

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CIVIL ACTION NO.
3-05CV1335 (JCH)

R. JAY DROLETT,
Plaintiff,

v.

EDWARD J. DEMARCO, JR., et. al.,
Defendants.

RULING ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT [Doc. No. 62]

I. INTRODUCTION

The plaintiff, R. Jay Drolett ("Drolett"), a police officer, brings an action against defendants the Town of East Windsor ("Town"); Edward J. DeMarco, Jr., the Town's Chief of Police; Richard U. Sherman, chairman of the Town's Police Commission; and the following members of the Police Commission: Linda Sinsigallo, Mark Simmons, Lorraine DeVanney, and James Barton (collectively, "defendants"). Drolett sues each of the individually-named defendants in his or her individual capacity. Drolett alleges retaliation in violation of his First Amendment rights, pursuant to 42 U.S.C. § 1983.

The defendants have filed a Motion for Summary Judgment [Doc. No. 62] seeking to dismiss Drolett's

claims pursuant to Rule 56 of the Federal Rules of Civil Procedure.

II. STANDARD OF REVIEW

In a motion for summary judgment, the burden is on the moving party to establish that there are no genuine issues of material fact in dispute and that it is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986); White v. ABCO Engineering Corp., 221 F.3d 293, 300 (2d Cir. 2000). Once the moving party has met its burden, the nonmoving party must "set forth specific facts showing that there is a genuine issue for trial," Anderson, 477 U.S. at 255, and present such evidence as would allow a jury to find in his favor in order to defeat the motion. Graham v. Long Island R.R., 230 F.3d 34, 38 (2d Cir. 2000).

In assessing the record, the trial court must resolve all ambiguities and draw all inferences in favor of the party against whom summary judgement is sought. Anderson, 477 U.S. at 255; Graham, 230 F.3d at 38. "This remedy that precludes a trial is properly granted only when no rational finder of fact could find in favor of the non-moving party." Carlton, 202 F.3d at 134. "When reasonable persons, applying the proper legal standards, could differ in their responses to the question" raised on the basis of the evidence presented, the question must be left to the jury. Sologub v. City of New York, 202 F.3d 175, 178 (2d Cir. 2000).

III. FACTUAL BACKGROUND[1]

Ronald Jay Drolett was a Sergeant in the Police Department of the Town of East Windsor, CT. See Def.'s Loc.R.Civ.P. 56(a)1 Statement ("Def.'s Stat.") at ¶ 1 [Doc. No. 64]. When Edward J. DeMarco, Jr., became Chief of that Department in 2003, there were twenty-four sworn police officers and twelve civilian employees. Id. at ¶¶ 2-3.

On September 16, 2004, DeMarco emailed the Police Department employees regarding the Department's no tolerance policy on slander and rumors, and that appropriate discipline would be given to those who violated that policy. Id. at DeMarco Aff. at Ex. A [Doc. No. 65]. DeMarco indicated that any employees with concerns were encouraged to come to him so that he could fix them. Id. at ¶ 8. DeMarco further ordered that a new Department Operational Directive ("DOD") be created to address the subject, which was issued on September 30, 2004. Id. at ¶¶ 9-10. The DOD addressed discrimination and harassment, including libelous and slanderous statements and rumors, and defined these concepts. Id. at DeMarco Aff. at Ex. B. It further informed employees that they would be disciplined for violation of the DOD. Id.

One of Chief DeMarco's duties is to ensure that the chain of command is followed within the Police Department. Id. at ¶ 17. Thus, on September 16, 2004, DeMarco emailed employees regarding the

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[1] For the purposes of the instant motion, the court accepts facts undisputed by the parties as true and resolves disputed facts in favor of the non-moving plaintiff, where there is evidence to support his allegations.

policies on following the chain of command. Id. at ¶ 21. The email stated that all employees must follow the chain of command "[w]hen discussing ANY police Department business," and must request permission "through the chain" to "seek a higher solution," which permission "will be granted." Id. at DeMarco Aff. at Ex. C. Section 5.01.01 of the Police Manual also addresses these policies, and states that "[i]t shall be the responsibility of the position of Captain, Lieutenant and Sergeant to see that the department's objectives are carried out in accordance with this manual, current job description, Chain of Command and department orders to ensure the efficient operation of the department at all times." Id. at DeMarco Aff. at Ex. D. Section 4.04.09 of the Police Manual further provides that "[o]fficers shall report to their commanding officer, all matters coming to their attention of police interest immediately." Id. at DeMarco Aff. at Ex. E.

In 2002, Detective Matthew Carl was the Police Department's only detective. Id. at Carl Aff. at ¶ 5 [Doc. No. 68]. Several officers, but not Drolett, were assigned to assist Detective Carl in his caseload.[2] Id. at ¶ 36. On December 10, 2004, Chief DeMarco emailed employees regarding the detective assignments and ordered that the "rude comments" addressed to those assigned to the Detective Division

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[2] According to the defendants, Drolett was not assigned to assist Detective Carl because Chief DeMarco suspected that Drolett had compromised an earlier undercover sting investigation and also believed Drolett had poor investigation skills. See Id. at ¶ 36. Drolett claims that this suspicion was based on an unsubstantiated rumor. See Plf.'s Loc.R.Civ.P. 56(a) Statement ("Plf.'s Stat.") at Drolett Aff. at ¶ 38 [Doc. No. 74].

stop immediately. Id. at DeMarco Aff. at Ex. F. According to DeMarco, Drolett was one of the employees who complained about the detective assignments. Id. at ¶ 39.

On February 14, 2005, Drolett sent an anonymous letter to four of the five members of the Police Commission, the Town of East Windsor's First Selectman, and a local newspaper, which arrived at the Police Commission on February 16, 2005, the same night that it was to conduct DeMarco's personnel evaluation. Id. at ¶¶ 44, 47. DeMarco thus learned about this letter for the first time at his review. Id. at ¶¶ 49, 51-52. The review was public knowledge, as an agenda was posted regarding the items to be addressed by the Police Commission that night. Id. at ¶ 50; Plf.'s Stat. at ¶ 50. An article about the letter was also published in the local newspaper, which was subsequently posted in the Police Department's patrol room. See Def.'s Stat. at ¶ 48.

The anonymous letter informed the Commission of five "things that are going on" of which it may not have been aware:

> (#1) Many shifts are without supervisors or even experienced officers because some people are not required to work their scheduled shifts. They are even handed the opportunity to get off them.
>
> (#2) Some people are sent all over the country for training while others get only the minimum. And other important training is also put off.

> (#3) So much money was spent on the cars for the chief and detective that their [sic] wasn't enough left for the line cars. Maybe the money spent on remote starters, tinted windows and multi deck CD players for 2 people could of [sic] helped the many that do the work. How much over what was budgeted for those cars was spent?
>
> (#4) Manpower from the whole department was diverted to cover for one person who didn't do his job till the complaints were too much to hide. We are talking about a guy who did as few as 1 arrest warrant per year and would have been fired any where else.
>
> (#5) The standard golden circle where some people can getaway with anything and have all the assignments handed to them and are praised for the simplest things and others are used as scape goats and only their [sic] to be used. This area include the double standards that really hurt moral [sic].

See Id. at ¶ 45; Complaint at Ex. A [Doc. No. 1]. Paragraph Two referred to Carl and DeMarco, referencing the former's investigation training in Florida and the latter's FBI training in Virginia. Id. at ¶¶ 82-83. Paragraph Four referred to Carl. Id. at ¶ 57.

According to Richard U. Sherman, Chairman of the Town of East Windsor Police Commission, the Commission believed the letter was written by a "disgruntled police officer who wished to primarily complain about personal gripes or grievances," and who wished to embarrass DeMarco on the night of his review. Id. at Sherman Aff. at ¶¶ 1, 23-24 [Doc.

No. 66]. Much of the information in the letter was already known to the Commission. Id. at Sherman Aff. at ¶ 25. All of the information contained in the letter is disputed by the defendants as "mis-truths and misinformation." Id. at ¶ 129. Drolett used the term "golden circle" to refer to alleged favoritism some Department employees received from DeMarco and his Administration. See Plf.'s Stat. at ¶ 33. After writing the letter, Officer David McNeice, Jr. complained about Drolett considering him to be a "golden boy" in an email to his superior officer, which was forwarded to DeMarco. See Def.'s Stat. at ¶ 127.

Sergeant Michael Hannaford, the Department's Internal Affairs Investigator, conducted an internal investigation regarding the anonymous letter. Id. at ¶¶ 137-38. At least two police officers were questioned during this investigation before Drolett admitted that he had written and sent the letter as an East Windsor resident. Id. at ¶¶ 139-41. Hannaford concluded that the contents of Drolett's letter were derived from his position as police officer and supervisor, that Drolett "consciously chose to ignore this department's chain of command," and that Drolett's letter "was intended to disrupt theorder of this department, to cause personal discredit to the reputations of the Chief of Police and Detective." Id. at Hannaford Aff. at Ex. A [Doc. No. 67]. Hannaford also found Drolett had violated some provisions of the Police Manual and DODs. Id.

The question of whether any discipline was warranted was referred to the Police Commission, which held a public hearing on June 8, 2005. Id. at ¶¶ 148-49. Drolett was represented by a union-appointed lawyer. Id. at ¶ 151. At the conclusion of

the hearing, the Commission found Drolett to have violated some provisions of the Police Manual and DODs, and suspended him for ten days without pay and placed him on probation for six months. Id. at DeMarco Aff. at Ex. K. Drolett grieved this discipline, and three days of hearing were held before the Connecticut Department of Labor Board of Mediation and Arbitration at the end of 2006.[3] Id. at ¶ 157-58.

IV. DISCUSSION

A. First Amendment Retaliation

Drolett claims that the discipline he received was done in retaliation for exercising his First Amendment right to protest workplace mismanagement and other matters by sending an anonymous letter to the Police Commission. The defendants challenge Drolett's retaliation claim on a number of grounds.

It is well-accepted that "public employees do not surrender all their First Amendment rights by reason of their employment." Garcetti v. Ceballos, __ U.S. __, 126 S. Ct. 1951, 1957 (2006). However, "[i]n measuring the extent of this right, the interests that must be carefully balanced are the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Sheppard v. Beerman, 317 F.3d 351, 355 (2d Cir. 2003) (quoting Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968)). "In order to establish a First Amendment claim of retaliation as a public

[3] The Board was to issue a decision in May 2007. Id. at ¶ 158.

employee, [a plaintiff] must show that (1) his speech addressed a matter of public concern, (2) he suffered an adverse employment action, and (3) a causal connection existed between the speech and the adverse employment action." Konits v. Valley Stream Cent. High School Dist., 394 F.3d 121, 124 (2d Cir. 2005) (internal quotation marks omitted).

The first question the court must ask in deciding a First Amendment retaliation claim is whether the public employee spoke "as a citizen upon matters of public concern" or "as an employee upon matters of personal interest." Connick v. Myers, 461 U.S. 138, 147 (1983); see also Melzer v. Bd. of Ed., 336 F.3d 185, 193 (2d Cir. 2003). If the court finds that the employee spoke as an employee on a matter of personal interest, "the employee has no First Amendment cause of action based on his or her employer's reaction to the speech." Garcetti, 126 S. Ct. at 1958.

In Garcetti, the Supreme Court focused on when a public employee speaks "as a citizen" under the First Amendment. See Garcetti, 126 S. Ct. at 1956 (finding that the Ninth Circuit erred in ignoring whether the plaintiff made the speech at issue "as a citizen" and only determining that the speech addressed a matter of public concern). The Court attempted to balance "the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion," with the need to avoid empowering public employees to "constitutionalize the employee grievance." Id. at 1958, 1959. Looking at the facts in Garcetti, the Court reasoned that, while relevant, the fact that the speech at issue was made inside the

office, rather than publicly, and that the speech concerned the subject matter of the speaker's employment, were not dispositive. Id. at 1959. The Court ultimately found that the "controlling factor" in the case was that the speaker's "expressions were made pursuant to his duties." Id. at 1959-60. Thus, the Court held that, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." Id. at 1960.

The defendants argue that Drolett is not entitled to First Amendment protection because "he had a duty as part of his employment to say what he said (following the chain of command to do so)." See Def.'s Memorandum in Support of Motion for Summary Judgment ("Mem. in Supp.") at 2 [Doc. No. 63]. They point to Section 4.04.09 of the Police Manual, which requires "[o]fficers [to] report to their commanding officer, all matters coming to their attention of police interest immediately," see Def.'s Stat. at DeMarco Aff. at Ex. E, and argue that the statements in Drolett's letter are "matters of police interest," see Def.'s Mem. in Supp. at 27. Thus, according to the defendants, Drolett was discharging his police officer's duty to report by reporting these matters, even though in violation of the established chain of command. Id. Drolett argues that the aforementioned provision of the Police Manual applies only to Police Department employees "who are acting in the course of performing their police duties," and thus is inapplicable in his situation, where he was communicating to the Police

Commission as a "taxpayer, resident and citizen." See Plf.'s Stat. at Drolett Aff. at ¶ 37.

The court concludes that, on the record before this court, there are genuine issues of material fact as to whether Drolett was acting pursuant to his official duties when he sent his letter to the Police Commission and local press. The defendants' argument appears to center on Police Department rules and regulations that give employees a duty to report problems and that they must do so through the chain of command. This argument is similar to one rejected by the court in Barclay v. Michalsky, 451 F. Supp. 2d 386, 395-96 (D. Conn. 2006), in which a nurse complained to her supervisors about employees sleeping on the job and the use of excessive restraints. With respect to the Garcetti argument, the court held that, "[n]otwithstanding that Work Rule #30 requires employees to report any rule violations to their supervisors, as Garcetti instructed the inquiry is a practical one, and material issues of fact exist as to whether plaintiff's complaints were made in the context of her job responsibilities." Id. at 395.

Here, there is no evidence that Drolett's official duties included complaining about all kinds of workplace mismanagement, whatever the context in which these complaints were made.[4] In Garcetti, there was no dispute that part of the plaintiff's

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[4] The court finds that Drolett's argument, that Garcetti does not apply because nothing in his job description required him to send letters to the Police Commission, is inapposite. Instead, the proper focus is to determine whether Drolett had a duty to report on all kinds of issues pursuant to his official job duties. See Garcetti, 126 S. Ct. at 1960.

responsibilities as calendar deputy were to investigate concerns and advise his supervisors regarding pending criminal cases. See Garcetti, 126 S. Ct. at 1960. Under these circumstances, the Supreme Court found that the plaintiff was doing what he was employed to do, and was therefore acting not as a citizen but as a government employee whose speech did not qualify for First Amendment protection. Id. Here, unlike Garcetti, the parties dispute whether complaining (anonymously) to the Police Commission about staffing, mismanagement, and budgetary issues was part of Drolett's ordinary job duties or "core function" as Sergeant. See Kodrea v. City of Kokomo, Ind., 458 F. Supp. 2d 857, 868 (S.D. Ind. 2006) (cited in Barclay, 451 F. Supp. 2d at 396 n.6). The court does not construe the Police Department's rules to require Drolett to make complaints, but only to permit him to do so – that is, there is no evidence that he was employed specifically to make such reports.[5] See Garcetti, 126 S. Ct. at 1959-60 ("The controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy. . . . Ceballos wrote his disposition memo because that is part of what he, as a calendar deputy, was employed to do."). Indeed, the defendants have not established that reporting such matters "was particularly within the province of plaintiff's professional duties, more so than that of

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[5] The defendants concentrate on the fact that Drolett had an official duty to follow the chain of command. However, the court finds that the contours of Garcetti, which the Supreme Court has not yet defined, see 126 S. Ct. at 1961, would be stretched too far by accepting the argument that the mere existence of such a duty means that any discipline for violating it is insulated from First Amendment protection.

other [Police Department] employees." See Barclay, 451 F. Supp. 2d at 396 (emphasis added).

Furthermore, while it is true that the Police Manual required employees to report all matters "of police interest," the court finds that this cannot be construed to mean that police officers have an official duty to report all matters involving the Police Department, regardless of context. Such a construction would ignore the Supreme Court's admonition that "[t]he First Amendment protects some expressions related to the speaker's job," and thus whether the subject matter of the speech involved the speaker's employment is "nondispositive." Garcetti, 126 S. Ct. at 1959. Indeed, as another court in this Circuit put it, the defendants' broad construction would

> have this Court transform Garcetti into an impermeable rule that all speech by governmental officials, no matter the facts presented, is fully engulfed by their governmental duties and eschewing, under any circumstance, the possibility or the opportunity that on another given day they may speak as private citizens on matters that may be relatively close to their employment. If we were to adopt Defendants' argument, we would inextricably have [to] find that Garcetti dictates a bright-line rule–an all or nothing determination–on an employee's speech even if it tangentially concerns the official's employment. We find that Garcetti does not stand for that proposition.

Jackson v. Jimino, 2007 WL 1160409, at *3 (N.D.N.Y. 2007). Because the record does not clearly

establish that Drolett wrote his letter to the Police Commission as part of the discharge of his duties as a police officer, the court concludes that Garcetti does not control the outcome of this motion. Thus, the court must turn to whether Drolett's speech addressed a matter of public concern.

Whether an employee's speech addresses a matter of public concern is a question of law that "must be determined by the content, form, and context of a given statement, as revealed by the whole record." Connick, 461 U.S. at 146; see also Rankin v. McPherson, 483 U.S. 378, 388 (1987); Reuland v. Hynes, 460 F.3d 409, 416 (2d Cir. 2006). "As a general rule, speech on 'any matter of political, social, or other concern to the community' is protected by the First Amendment." Morris v. Lindau, 196 F.3d 102, 110 (2d Cir.1999) (quoting Connick, 461 U.S. at 146).

Thus, while looking to the record as a whole, a court must analyze the content, form, and context of an employee's speech in order to decide whether it addresses an issue of public concern. Connick, 461 U.S. at 147-48. Drolett argues that his letter addressing staffing and training issues, expenditure of funds, and mismanagement or favoritism are matters of public concern. See Plf.'s Mem. in Opp. at 4-6. To support his argument, Drolett cites Morris, 196 F.3d at 111, in which the Second Circuit found that "speech on crime rates, police staffing, equipment shortages and related budgetary matters quite plainly involve matters of public concern." The defendants respond by arguing that all of the statements in Drolett's letter involved personal grievances dealing only with an employee's personal working conditions, and thus they do not constitute

matters of public concern. See Def.'s Mem in Supp. at 33-36.

While a speaker's motive is not dispositive to whether his speech concerned a matter of public concern, Reuland, 460 F.3d at 418, the court must still take "content, form, and context" into consideration in making this determination. Connick, 461 U.S. at 147-48, and it may therefore also consider "whether the speech 'was calculated to redress personal grievances or whether it had a broader public purpose," Hoyt v. Andreucci, 433 F.3d 320, 330 (2d Cir. 2006) (citations omitted). The court finds it significant that Drolett's letter was written anonymously, was sent to the Police Commission where it became public knowledge, and was also sent to the Town's First Selectman and local newspaper. These facts go far toward at least creating an issue of fact as to whether Drolett was complaining as a citizen and taxpayer on matters of concern to the public as a whole, and not just to him as a government employee.[6] Drolett has consistently indicated that he was communicating to the Police Commission as a "taxpayer, resident and citizen." See Plf.'s Stat. at Drolett Aff. at ¶ 37.

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[6] The court finds that the defendants' argument that "context, form and motive compel the conclusion that Drolett's public concern assertion is a transparent attempt to immunize him from discipline for airing his personal gripes in public in violation of his duties as a police officer," see Def.'s Reply at 9 [Doc. No. 80], raises an issue of fact as to Drolett's motive – that is, whether he wrote the letter to the Police Commission as a citizen and taxpayer on matters of public concern or as an employee on personal matters. The court cannot, as a matter of law, reach the conclusion defendants urge, based on Drolett's testimony regarding this issue.

In addition, evaluating each of Drolett's statements separately, the court finds that they all relate to matters of public concern. As Drolett points out, the Second Circuit held that speech on police staffing and budgetary matters "quite plainly involve matters of public concern." Morris, 196 F.3d at 111; see also Lewis v. Cowen, 165 F.3d 154, 164 (2d Cir. 1999) ("Courts have frequently found that the public fisc is a matter of public concern."). These issues are addressed, directly or indirectly, in Paragraphs One, Three, and Four of Drolett's letter to the Police Commission. The court also finds Paragraph Two, alleging inadequate or unequal training, to be a matter of public concern, because the public has an interest in the training of its police officers.[7] Cf. Barclay, 451 F. Supp. 2d at 396-97. Similarly, the public has a concern in the policies and practices of a local police department, including allegations of favoritism and other practices damaging morale. See Shelton Police Union, Inc. v. Voccola, 125 F. Supp. 2d 604, 627-28 (D. Conn. 2001) (finding statements concerning racial comments by the Chief of Police, conflicts of interest within the police department, and the general operation and management of the police department involved matters of public concern); cf. Johnson v. Ganim, 342 F.3d 105, 112 (2d Cir. 2003). Thus, Paragraph Five also relates to a matter of public concern. Hence, "[b]ecause [Drolett's] statements were not personal, involved

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[7] The fact that Paragraph Two referred to Detective Carl and Chief DeMarco, and Paragraph Four referred to Detective Carl, persons toward whom Drolett, according to the defendants, harbored animosity, see Def.'s Mem. in Supp. at 34, does not make the statements' substance (training and staffing) any less matters of public concern.

departmental practices and policies, were made in the context of community discourse about the issues, and were made to the public, they were matters of public concern." Voccola, 125 F. Supp. 2d at 628.

Because at least some of Drolett's statements arguably concerned a public issue, the court turns to the defendants' next argument, that even if Drolett's speech relates to a matter of public concern, the Pickering balance falls in the employer's favor.[8] See Def.'s Mem. in Supp. at 2. Indeed, "[a] government official may nonetheless fire an employee for speaking on a matter of public concern if the employee's speech is reasonably likely to disrupt the effective functioning of the office, and the employee is fired to prevent this disruption." Sheppard, 317 F.3d at 355. To make this determination, courts must balance the potential for disruptiveness in the workplace against a public employee's First Amendment rights. See, e.g., Connick, 461 U.S. at 150-53; Lewis, 165 F.3d at 161 ("This weighing, commonly referred to as the Pickering balancing test, is necessitated by the State's dual role as employer and sovereign."). This balancing test requires courts to weigh the "interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its

[8] The Pickering balancing is 8 triggered even if only some of the speech touches on a matter of public concern. See Connick, 461 U.S. at 148-50 (proceeding to the Pickering balancing even though only one of plaintiff's questions was on a matter of public concern).

employees."[9] Sheppard, 317 F.3d at 355 (quoting Pickering, 391 U.S. at 568). However, "[e]ven if the court finds that the competing interests favor the government/employer, a First Amendment plaintiff can establish liability 'by proving that the employer disciplined the employee in retaliation for the speech, rather than out of fear of the disruption.'" Sweeney v. Leone, 2006 WL 2246372, at *6 (D. Conn. 2006) (quoting Lewis, 165 F.3d at 163).

The defendants make a variety of arguments to support their Pickering analysis. They note first that police departments, as para-military organizations, are given greater latitude in regulating employees' speech than other governmental bodies. See Def.'s Mem. in Supp. at 21. They also argue that Drolett's letter actually disrupted the effective functioning of the Police Department, or that it was reasonably likely to do so, and that the court should defer to the employer's judgment of disruption. Id. at 22-24. Finally, they argue that Drolett's failure to follow the chain of command results in the Pickering balancing falling in the defendants' favor. Id. at 24-26. Drolett disputes that any disruption occurred, or was likely to occur, as a result of his anonymous

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[9] The Second Circuit has stated that, "[w]hile as a general rule the [Pickering] test is a matter of law for the district court to apply, where there are questions of fact relevant to that application, this court has made known that 'we can envision cases in which the question of the degree to which the employee's speech could reasonably have been deemed to impede the employer's efficient operation would properly be regarded as a question of fact, to be answered by the jury prior [to] the [district] court's application of the Pickering balancing test.'" Johnson, 342 F.3d at 114 (2d Cir. 2003) (citations omitted).

letter to the Police Commission. See Plf.'s Mem. in Opp. at 10-16.

With respect to the disruption argument, the defendants assert that Drolett's letter "caused turmoil and disturbance" within the Police Department, and negatively affected relations among employees by creating tensions and distrust. See Def.'s Stat. at Polinquin Aff. at ¶ 6 [Doc. No. 69]; McNeice Aff. at ¶¶ 8, 20 [Doc. No. 70]. However, Drolett has presented testimony, both his own and that of Officer John A. Scavotto, that his letter "did not cause disruption to the department as a whole," see Plf.'s Stat. at Scavotto Aff. at ¶ 13 [Doc. No. 75]; Drolett Aff. at ¶ 45, and thus has created an issue of fact as to whether the letter became a general source of discussion or affected officer morale or relations, or whether it was likely to cause such disruption. See Plf.'s Stat. at Scavotto Aff. at ¶¶ 13-15. Indeed, according to Drolett's evidence, tensions and lack of morale were already present well before he sent his letter, due to favoritism and supervisory problems within the Department. Id. at ¶¶ 4, 14.

However, even if the court accepts the defendants' disruption argument for purposes of this Motion, the Pickering inquiry does not end there. Indeed, in such a case, "a First Amendment plaintiff can [still] establish liability 'by proving that the employer disciplined the employee in retaliation for the speech, rather than out of fear of the disruption.'" Sweeney, 2006 WL 2246372, at *6 (citations omitted). The court finds that there is a genuine issue of fact such that reasonable minds could differ as to whether Drolett's speech, rather than its potential for disruption, motivated the defendants' discipline of him. Although the

defendants argue that Drolett was disciplined for violating Police Department rules, including sidestepping the chain of command and the requirement that all police matters be reported within the Department, the court has already found that these rules do not necessarily apply in a situation, such as this one, where Drolett sent his letter anonymously, and, according to Drolett, as a citizen and taxpayer rather than as a government employee. See supra at 11.

Moreover, at the June 8, 2005 hearing in front of the Police Commission, Chief DeMarco indicated that the nature of the charges against Drolett included, among others, "the false statements about other employees;" DeMarco also accused Drolett of giving "mis-truths and misinformation" and making one allegation that is "extremely offensive to one of the employees who works in this building and we have to remember that there is a victim here." See Def.'s Stat. at DeMarco Aff. at 8, 23. This evidence creates an issue of fact as to whether Drolett's speech, rather than any disruption it may have caused, was the reason for the disciplinary action taken by the Commission. The court cannot, therefore, find for the defendants as a matter of law on whether Drolett's suspension was based on the potential for disruption rather than because of his speech, because this question involves the defendants' motives, which involves unresolved questions of fact. See Johnson, 342 F.3d at 114-15 (finding factual issue existed over employer's motives for firing employee because employee would not have been fired if he had not written the letters that led to disruption).

Finally, the defendants argue that Drolett was disciplined for making several false or hyperbolic statements in his letter to the Police Commission.[10] See Def.'s Mem. in Supp. at 27. The Pickering Court applied the standard set out in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and found that the plaintiff could not be discharged for his public statement, even though it was at least partially false, without proof that the statement was knowingly or recklessly made. Pickering, 391 U.S. at 574. Similarly, the Second Circuit held in Reuland v. Hynes, 460 F.3d at 413-15, that "[f]alse speech, as well as hyperbole, is still entitled to First Amendment protection, as long as it is not made with knowledge or reckless disregard of its falsity." The reason for such protection is because "erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they need to survive.'" Sullivan, 376 U.S. at 271-72 (citations omitted). This protection for false speech also applies to public employee speech. Reuland, 460 F.3d at 414.

To show that Drolett's statements are not entitled to First Amendment protection because they are false or hyperbolic, the defendants must show that each of the statements "(1) would reasonably have been perceived as an assertion of fact, (2) was

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[10] The defendants claim that four of the five statements in Drolett's letter were false. The fifth statement, regarding the "golden circle," is a statement of opinion; however, the defendants claim that "this opinion that favoritism exists is expressed in such a hyperbolic fashion" that it, too, is not protected by the First Amendment. See Def.'s Mem. in Supp. at 27 n.19.

false, and (3) was made with knowledge or reckless disregard of its falsity." Id.

Regarding Paragraph One, Drolett admitted that the Department met the Town policy of shift minimums and acknowledged that budgetary constraints made it difficult to staff every shift with a sergeant. See Def.s Stat. at Ex. A, Hearing of Connecticut Department of Labor Board of Mediation and Arbitration ("DOL Hearing") at 91-92 [Doc. No. 64]. However, Drolett also provided evidence that some shifts were without "even experienced officers," see Plf.'s Stat. at Drolett Aff. at ¶ 22, and the parties have not pointed to evidence in the record indicating that the minimum shift requirement did not include having an experienced officer on a shift. As for whether some officers were "handed the opportunity to get off [shifts]," police officers are at times given special work assignments, such as fleet or computer maintenance or training officer work. See Def.'s Stat. at ¶¶ 99-100. Drolett was given some of these special assignments from time to time. Id. at 101. Drolett testified that one sergeant did not work the midnight shift on numerous nights in July and August 2003 "because he had accumulated compensatory time working on computers as a special assignment." See Plf.'s Stat. at Drolett Aff. at ¶ 22. Although the defendants point to Chief DeMarco's contractual requirement to accommodate an officer's compensatory time, which could affect shift coverage, see Def.'s Stat. at 102, the court cannot conclude on the record before it that Drolett made the criticism knowing it was false or recklessly disregarding the truth.

Paragraph Two of the letter referred to Detective Carl and Chief DeMarco, referencing the former's

investigation training in Florida and the latter's FBI training in Virginia. Id. at ¶¶ 82-83. Other officers have also attended out-of-state training opportunities. Id. at ¶ 84. Drolett requested bicycle training in Brunswick, GA, which was rejected.[11] Id. at ¶ 87. Several months prior to this request, Drolett had broken his clavicle riding his bicycle recreationally. Id. at ¶ 88. On January 31, 2005, DeMarco emailed Drolett that the child protection computerized training he had requested would not be granted, because he could not lose a supervisor for 16 hours a week. Id. at DeMarco Aff. at Ex. H. Based on these facts, it appears Drolett made the statement based on his experience, and thus there is an issue of fact as to whether he made the statement about training knowing it was false or recklessly not knowing it was false.

Paragraph Three also appears to have been made based on the information available to Drolett at the time. DeMarco's administrative assistant informed Drolett there was not enough money to pay for stop sticks and defibrillators due to the money spent on the cars for the Chief and the Detective. Id. at ¶ 114. While the defendants claim that the administrative assistant was mistaken, Id. at DeMarco Aff. at ¶ 76, and there was sufficient money to purchase these line car items but there was a delay in purchasing them, it is not clear if such purchases were made before or after Drolett's letter. Thus, based on the

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[11] Although the defendants list a number of training programs to which Drolett applied for, but was rejected, see Id. at ¶¶ 85-86, the relevant pages of Drolett's testimony, Ex. A, DOL 66-68, discussing these programs are missing from the defendants' exhibits; thus, the court is unable to take them into consideration.

evidence before it, the court cannot now conclude Drolett made any false statements or recklessly disregarded the truth in this Paragraph.

Paragraph Four of the letter referred to Detective Carl, the Police Department's only detective. See Def.'s Stat. at Carl Aff. at ¶ 5. At various times, some officers were assigned to assist Carl in his caseload. Drolett testified that other officers told him that there was "a drawer full of files that Detective Carl had not gotten to," although he acknowledged that this statement was based on hearsay. See Def.'s Stat. at ¶ 76. However, this statement need not be taken for the truth of what it asserts, but to indicate Drolett's state of mind prior to writing his letter. If so, this information, in addition to Drolett's disagreement with the defendants that there was "more work than one detective could handle," see Def.'s Stat. at Ex. A, DOL Hearing at 62, creates an issue of fact as to whether Drolett made this statement with knowledge that it was false or a reckless disregard for the truth.

As for the second statement in Paragraph Four regarding Carl's arrest warrant statistics, this was based upon Drolett's viewing of a handwritten log kept by the Records Clerk. Id. at ¶ 62. All warrant information is located in the electronic information system of the Department's internal computer system. Id. at ¶ 65. Drolett was familiar with this system and had access to all the (unsealed) information stored within it. Id. at ¶¶ 67-68. However, Drolett claims that, as he understood the recordkeeping system as of February 2005, he believed the handwritten log contained the same information as the electronic records. See Plf.'s Stat. at Drolett Aff. at ¶ 18; Def.'s Stat. at Ex. A, DOL

Hearing at 49. Drolett also claims that, when he told DeMarco that he had reviewed the arrest warrant log with respect to Carl, DeMarco did not question him as to the accuracy of those records. See Plf.'s Stat. at Drolett Aff. at ¶ 18. Drolett appears to have made the statement based on the information available to him, believing it was true at the time it was made, which does not as a matter of law show that Drolett made the allegation knowing it was false or recklessly disregarding the truth.

Finally, the defendants' argument with respect to Paragraph Five is that "[i]t is virtually impossible to respond to such a vague and conclusory allegation" of favoritism. See Def.'s Mem. in Supp. at 27 n.19. The court already found that Drolett has provided evidence of favoritism, see supra at 16 (citing Plf.'s Stat. at Scavotto Aff. at ¶¶ 4, 14), and thus it cannot conclude as a matter of law that Drolett made this statement with falsity or reckless disregard for the truth.

For the foregoing reasons, the Motion for Summary Judgment is denied.

B. Qualified Immunity

The court next addresses the defendants' claim that qualified immunity shields DeMarco and the Police Commissioners from individual liability for the federal violation alleged in this suit. Qualified immunity insulates government officials from personal liability when they perform discretionary duties pursuant to their official functions "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The threshold

question in determining whether a government actor's actions warrant qualified immunity is "whether the plaintiff's version of the facts show[s] the officer's conduct violated a constitutional right." Demoret v. Zegarelli, 451 F.3d 140, 148 (2d Cir.2006) (citations omitted). If "a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established." Id. If so, government officials are entitled to qualified immunity "only if [they] can show that, viewing the evidence in the light most favorable to plaintiff[], no reasonable jury could conclude that the defendant[s] acted unreasonably in light of the clearly established law." Id. (citations omitted).

The court has already found that Drolett created a material issue of fact on his First Amendment claim. Moreover, "[t]he prohibition against suspending or terminating employees for the content of their speech has been clearly established since 1968."[12] Johnson, 342 F.3d at 116. Therefore, the defendants are only entitled to qualified immunity if it was "'objectively reasonable for [them] to believe

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[12] Although Garcetti has rendered certain aspects of First Amendment retaliation law unclear, the court found that Garcetti was not controlling to the facts of this case. See supra at 11. In addition, the defendants' argument that the use of a balancing test in determining the presence of a right means that the right is not clearly established is based on case law from other circuits, and is therefore not controlling to this court. See Def.'s Mem. in Supp. at 38. In fact, in a recent post-Garcetti decision, the Second Circuit reiterated that "previous cases have recognized and defined the First Amendment right of public employees to be free from retaliation for speech on matters of public concern with reasonable clarity." Reuland, 460 F.3d at 419-20.

that [their] conduct did not violate [Drolett's] rights.'" Savino v. City of New York, 331 F.3d 63, 71 (2d Cir.2003) (citations omitted).

The court finds that a reasonable jury could conclude that the defendants acted unreasonably in light of this clearly established law. To the extent the defendants' qualified immunity defense is based on the assertion that Drolett's letter to the Police Commission was not a matter of public concern because it was false or hyperbolic, the Second Circuit recently indicated that the existence of well-established Supreme Court precedent regarding hyperbolic speech under the First Amendment renders it unreasonable for the defendants to believe Drolett's speech was not protected "because it was untrue." Reuland, 460 F.3d at 420. Moreover, the context in which his letter was sent – anonymously and to the Commission as well as a local politician and newspaper – and the content of the statements themselves, indicate that the letter was not written in Drolett's capacity as a police officer. Thus, it would not have been objectively reasonable for the defendants to believe that Drolett's letter was not a matter of public concern, or that they could discipline him because of having sent it.

The defendants rely on a case from outside of the Circuit, Wagner v. City of Holyoke, 404 F.3d 504 (1st Cir. 2005), in support of their argument that Drolett's broad and antagonistic complaints and his disregard of the chain of command made it reasonable for the defendants to have believed they were entitled to discipline him regardless of the content of his speech. See Def.'s Mem. in Supp. at 39-40. However, this case is not controlling on this court, which is bound by such decisions as Reuland,

a First Amendment retaliation case in which the Second Circuit stated that where "'specific intent is actually an element of the plaintiff's claim as defined by clearly established law, it can never be objectively reasonable for a government official to act with the intent that is prohibited by law.'" 460 F.3d at 419; see also Mandell v. County of Suffolk, 316 F.3d 368, 385 (2d Cir. 2003) ("Where specific intent of a defendant is an element of plaintiff's claim under clearly established law, and plaintiff has adduced sufficient evidence of that intent to defeat summary judgment, summary judgment on qualified immunity grounds is inappropriate."). Despite the defendants' assertion that they disciplined Drolett for the disruption he caused and the rules he violated, reading the evidence in the light most favorable to Drolett, there is evidence in the record that could support an inference that the defendants disciplined him as a result of his protected speech. See Barclay, 451 F. Supp. 2d at 400.

V. CONCLUSION

For the foregoing reasons, the defendants' Motion for Summary Judgment [**Doc. No. 62**] is DENIED.

SO ORDERED.

Dated at Bridgeport, Connecticut this 22nd day of June, 2007.

/s/ Janet C. Hall

Janet C. Hall

United States District Judge

UNITED STATES COURT OF APPEALS
FORTHE SECOND CIRCUIT

Entered: August 20, 2010

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 20th day of August, two thousand ten.

R. JAY DROLETT,
Plaintiff – Appellee,

v.

EDWARD J. DEMARCO, JR., RICHARD SHERMAN, LINDA SIMISGALLO, MARK SIMMONS, LORRAINE DEVANNEY, JAMES BARTON AND TOWN OF EAST WINDSOR,
Defendants – Appellants.

R. Jay Drolett having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc,* and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en bane,*

IT IS HEREBY ORDERED that the petition is denied

FOR THE COURT:

/s/ Catherine O'Hagan Wolfe, Clerk

Entered December 29, 2006

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

R. JAY DROLETT,
Plaintiff,

vs.

EDWARD J. DeMARCO, JR.,
RICHARD U. SHERMAN,
LINDA SINSIGALLO, MARK SIMMONS,
LORRAINE DeVANNEY, JAMES BARTON,
in their individual capacities and the
TOWN OF EAST WINDSOR,
Defendants.

MOTION FOR SUMMARY JUDGMENT

Defendants, Town of East Windsor, its police chief, Edward J. DeMarco, Jr. ("the Chief" or DeMarco") and the members of its Police Commission,[1] move for Summary Judgment. Plaintiff R. Jay Drolett ("Drolett"), an officer in the Town of East Windsor's police department, brought this 42 U.S.C. § 1983 action, claiming that he was illegally disciplined because he exercised his First Amendment right to freedom of speech.

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[1] The Commission defendants, who along with the Chief were sued in their individual capacities include its Chairman, Richard U. Sherman and members Linda Sinsigallo, Mark Simmons, Lorraine DeVanney and James Barton

Drolett's suit cannot survive defendants' motion. To prevail in his suit, Drolett must establish that the speech in question was constitutionally protected public employee speech -- speech protected by the First Amendment. This he cannot do. There is no genuine issue as to any of the material facts in this regard, and applying the pertinent legal principles to these admitted or indisputable facts makes clear that the speech is wholly unprotected, that the Town was perfectly within its rights to discipline Drolett for "speaking" as he did.

Specifically, the undisputed compel the following conclusions, each which is sufficient by itself to require a summary judgment for the defendants.

1. Even if the subject of his speech could be deemed a matter of public concern, with Drolett speaking as a citizen, rather than an employee, the so-called *Pickering*[2] balance falls decidedly in the employer's favor. That is to say, the Town's interest in prohibiting the speech to promote the efficiency and effectiveness of its police operations far outweighs any theoretical First Amendment interest Drolett might have had in speaking as he did. Or, as the Second Circuit described it, "the employer's interest in avoiding disruption" far outweighs the employee's "interest in free speech." *Reuland v. Hynes,* 460 F.3d 409 (2d Cir. 2006).

2. Drolett had a duty as part of his employment to say what he said (by following the chain of command to do so). Therefore, pursuant to the Supreme Court's recent *Garcetti* decision, the

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[2] *Pickering v. Board of Education*, 391 U.S. 563, 20 L.Ed.2d 811, 88 S.Ct. 1731 (1968).

"speech" is not protected for this separate and independent reason. *Garcetti v. Ceballos*, _ U.S. _, 126 S.Ct 1951, 164 L.Ed.2d 689 (2006)

3. Drolett's speech was either false or hyperbolic. For this reason, it lacks protection under the Supreme Court's *New York Times Co. v. Sullivan*, 376 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) line of cases, apart from any consideration of the factors ordinarily germane to the "protection for public employee speech" analysis.

4. When he spoke as he did, Drolett was not in fact speaking as a citizen on a matter of public concern. Rather, he was speaking as an employee airing personal gripes and grievances for purely personal reasons, including personal animus for the Chief and jealousy toward colleagues of his in the Department. On this basis too, the speech is unprotected.

5. In the event that the Court determines that Drolett's Amendment are cognizable, summary judgment in favor of Chief DeMarco and the Police Commissioners is warranted because they are qualifiedly immune from suit.

Wherefore, pursuant to Rule 56 of the Federal Rules of Civil Procedure, Defendants respectfully request that this Court grant their Motion for Summary Judgment and dismiss Plaintiff's Amended Complaint.

DEFENDANTS

EDWARD J. DeMARCO, JR., RICHARD SHERMAN, LINDA SINSIGALLO, MARK SIMMONS, LORRAINE DeVANNEY, JAMES BARTON, in their individual capacities, and TOWN OF EAST WINDSOR

By: /s/ Joshua A. Hawks-Ladds
Joshua A. Hawks-Ladds (ct09446)
Pullman & Comley, LLC
90 State House Square
Hartford, CT 06103
Telephone: (860) 541-3306
Facsimile: (860) 424-4370
E-Mail: jhawks-ladds@pullcom.com

CERTIFICATION OF SERVICE

I hereby that on December 29, 2006, a copy of this Motion Summary Judgment was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this will be sent by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

s/ Joshua A. Hawks-Ladds
Joshua A. Hawks-Ladds (ct09446)
Pullman & Comley. LLC
90 State House Square
Hartford, CT 06103
Phone: (860) 541-3306
Fax: (860) 424-4370
Email: jhawks-ladds@pullcom.com

Entered February 5, 2007

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT
CASE NO.: 3:05CV-1335(JCH)

R. JAY DROLETT,
Plaintiff,

vs.

EDWARD J. DeMARCO, *et. al*,
Defendants.

Taken on: February 5, 2007

AFFIDAVIT OF R. JAY DROLETT

STATE OF CONNECTICUT) ss. Manchester
COUNTY OF HARTFORD)

I, R. Jay Drolett, being duly sworn, hereby depose and say:

1. I am over the age of 18 and believe in the obligations of an oath.

2. I am the Plaintiff in the above-entitled action.

3. I began working at the East Windsor Police Department ("EWPD") on April 26, 1981 as a part-time civilian dispatcher, and became full-time on March 28, 1982. On March 29, 1982 I was sworn in as a police officer in the EWPD and was appointed as a regular full-time probationary officer effective August 29, 1982. I successfully completed my probationary period and my training at the

Municipal Police Training Academy and continued work on a full-time basis as a patrol officer.

4. I participated in a competitive exam process and was promoted to the position of Sergeant effective October 14, 1990. I completed my probationary period as a Sergeant on October 14, 1991.

5 When I first began working at the East Windsor Police Department, Thomas J. Laufer, Sr. served as Chief of Police. He continued in this role until some time in 2002, when he retired and Captain Bernard F. Duffy served as Acting Chief of Police. Thereafter, Edward J. DeMarco Jr., a Defendant in this case, became Chief of Police.

6. At the time DeMarco took over in July 2003, our police department was not in disarray, nor were "rumor-mongering and backbiting" the rule rather than the exception in the department. Throughout my twenty-four (24) years with the EWPD, there have been instances of poor morale, difficult work relationships and dissatisfaction on the part of various officers which have surfaced from time to time. However, under the direction of Chief Laufer administration of the EWPD was consistent, with clear goals, objectives and policies that were, for the most part, uniformly followed and applied. Under DeMarco's leadership, there has been an uneven application of standards of conduct and a significant increase in favoritism as to training as well as assignment of duties and privileges which has caused a significant loss of morale in the department

7. It has not been my practice, during the course of my employment at EWPD, to instigate "rumors or dissension" among rank and file police officers.

There is absolutely nothing in my personnel file that suggests this is the case, and until 1wrote my letter to the Police Commission in February 2005 I was never accused of this.

8. During the time I have worked for the EWPD, it has been my practice to review any and all notices about training opportunities which are made available to members of our police department. I have never "applied" for training. Whenever training is offered which might enable me to better perform my duties as a police officer or which would improve my skills or increase my capabilities, I have not hesitated to indicate my interest in those opportunities. Some, but not all of the training I have sought out has been made available to me. See Exhibit A, attached hereto, which shows the training I have received through the EWPD, as reflected in my personnel file. All training I have sought as a member of the EWPD has been law-enforcement related and pertinent to my job.

9. For several years, until I went on extended leave in September 1999 due to a hip injury, I served as Training Officer for the EWPD. In that capacity, I instituted the practice of sending a-mails to all members of the department to inform them that training opportunities were coming up and might be available. Department members were supposed to respond and indicate their interest so that those opportunities could be offered. This practice continued after I ended my stint as training officer and I responded as indicated above. As training officer, I was supposed to make sure that members of the department received mandatory training as well as any other training that we were able to provide. Based on this experience, I know that under Chief

Laufer training opportunities were provided to those who requested training, within the department's budgetary constraints. I did not witness favoritism in this process.

10. Prior to sending my anonymous letter to the Police Commission on February 16, 2005, I had been the subject of only one disciplinary action throughout my twenty-five (25) years of employment at the EWPD. That discipline was imposed on me as a supervisor as a result of my failure to respond to misconduct by a patrol officer, Officer Scavatto, while he was working under me as shift supervisor. Specifically, Officer Scavatto had a civilian rider in the front passenger seat of his marked police cruiser. In the process of stopping a stolen vehicle he pulled along side the vehicle with the passenger side of his cruiser to the drivers side of the suspect vehicle. He then pulled his pistol out pointing it at the suspect, holding the pistol directly in front of his passenger. I arrived after the suspects were in custody. Another officer at the scene was attempting to tell me what officer Scavatto had done and I brushed him off. I was wrong and accepted the discipline imposed. I had a responsibility to know what the officers under my supervision were doing and to take corrective action to prevent it from happening again. See Memorandum re: Disciplinary Action dated November 4, 1993, attached as Exhibit B. Prior to sending my letter of February 16, 2005, I had never been disciplined or counseled for spreading rumors, making negative comments or making libelous or slanderous comments about anyone. Such accusations were made against me only after I sent my letter to the Police Commission.

11. Before writing my letter to the Police Commission I made a number of efforts to discuss the issues in that letter through the chain of command without success. Based on my experience, it was not DeMarco's practice to "review and address" any and all concerns brought to him. In fact, as discussed below, my experience was quite the contrary.

12. Our department had received laser equipment to be used in documenting speeding violations, but only one patrol officer, Officer Scavotto, was trained to use the equipment. in my view this negatively Impacted our ability to effectively address speeding violations. I first discussed this matter with Captain Duffy, my direct supervisor. While I was discussing the matter with Captain Duffy, DeMarco joined us. DeMarco stated that since Officer Scavotto had already been trained to use the laser, he would be utilized as an instructor for the other members of our department. Nothing was ever done to effectuate this, however, and I continued to request laser training for over a year. See Exhibit C, an e-mail message I sent to DeMarco on October 27, 2004.

13. Before writing my letter to the Police Commission. I had numerous communications with DeMarco concerning our lack of supervision on shifts, as well as our need for additional staffing. Some of these communications were in writing. See Exhibit D, attached. When those assigned to patrol were reassigned to Detective Matthew Carl's work, I expressed concerns to DeMarco that this left us short-staffed. This was not "juvenile behavior" or ("griping", but a legitimate concern that I had about

our ability to effectively engage in our patrol operations.

14. Before sending my letter to the Police Commission, I did bring my concerns about Carl's failure to complete his assignments through the chain of command. This issue initially came to my attention when I received a call from the Department of Children and Families ("DCF"), concerning important investigations that were being handled by Carl. When I asked the DCF representative why he was contacting me, he said that he had left several messages for Carl, but had not heard back from him. I forwarded a message about the DCF call to Carl and to his direct supervisor Captain Duffy. I saw Carl a short time later, and passed the information on to him in person. I then sent Captain Duffy a message that I had found Carl and passed the message on to him~ See Exhibit E, my email dated 9/27/04 which I sent to Captain Duffy.

15. Similar complaints were made about other cases and these came not only from concerned citizens but also from investigating officers who found themselves receiving calls from victims and their families for cases they had opened, which had been turned over to Cart. Officer Fahey expressed concerns to me about several of his cases that Carl had not finished. I relayed this complaint to Captain Duffy and informed him that Officer Fahey was willing to take the cases back and complete them himself. When Captain Duffy questioned Officer Fahey's ability to do the job properly, I offered to directly supervise Officer Fahey on the cases in question and to make sure that the work was done properly. Captain Duffy said he would think about it

but the cases were not turned over and continued to languish.

16. I also discussed this matter with DeMarco on at least one occasion, and I know that he was aware that there were a large number of complaints about Carl's unfinished work. DeMarco acknowledged in October 2003 that we had "recently...begun to receive a steady flow of citizens complaints from all angles about cases...that are old (sometimes months and months old)". See Exhibit F, attached.

17. Although DeMarco claimed that Carl's inability to complete investigations and issue warrants was due to his heavy workload, we had never experienced this type of problem prior to Mr. Carl's assignment as Detective. Before he took on that job, we had one police officer assigned to perform the duties of detective on a furl-time basis, as a long term special assignment, but this didn't result in the type of backlog that Carl generated. Based on that fact, and on the facts set forth below, I reasonably believed that the backlog was not due to Carl's heavy workload, but rather because of his failure to devote the necessary time and attention to his duties. I have no recollection of approving assignments to resolve a detective bureau backlog when I was union president.

18. When I discussed my concerns about Carl with DeMarco, I told him that I had reviewed the log in our records room and that based on that review, not failed to complete the specific cases that had been mentioned to met but he had also issued only one arrest warrant during the previous twelve months. In response, DeMarco did not suggest that I

review other records to check on the accuracy of these findings, nor did he provide me with any information which would lead me to conclude that my conclusion was incorrect. Based on my understanding of the EWPD record keeping system as of February 2005, the arrest warrant log that I reviewed would have contained the same information as would be in our computer system, with respect to arrest warrants generated by police personnel.

19. Prior to writing my letter to the Police Commission, I had raised concerns about vehicle maintenance with Captain Duffy, who was then in charge of that area. In fact, my complaints about vehicle maintenance had been made for years, and actually resulted in the assignment of that responsibility to me for a period of time. I asked to be relieved of these duties, and they were taken away for a period of time, then reassigned. During the time I was asked to perform this task, I performed the job to the best of my ability.

20. While I did not specifically use the term "golden circle" in discussions with DeMarco, I did complain about his favoritism in assignments. See email dated 10/29/03 from me to DeMarco, a part of Exhibit D. This written message continues an early discussion we had on this topic. He did not respond to my concerns.

21. I sent my letter to the East Windsor Police Commission anonymously on February 16, 2005. See Sherman Exhibit A. I did not write the letter in my capacity as a Police Sergeant or as a member of the EWPD. Rather, I wrote it as a citizen, taxpayer, businessman and resident of the Town of East

Windsor. I decided to write the letter because I believed that the mismanagement and waste in our police department was having a negative impact on our community. This belief was based on discussions I had with people in the community who had voiced concerns about the way in which police matters were being handled. In fact. I intentionally left my name off of the letter so that it would not be associated with me in my capacity as a police officer. My purpose in writing the letter was to bring these matters to the attention of the Police Commission. I gave testimony to this effect before the Police Commission, at my disciplinary hearing" See DeMarco Exhibit K.

22. Based on the facts set forth below, the comments made in my letter were true. First of all, many of our shifts were without supervisors or experienced officers because certain officers were assigned other duties, such as computers, training, firearms and crime suppression. This resulted in staffing which, in my view, impacted negatively on public health and safety concerns. Based on my review of shift schedules which have been provided to me, I can provide the following specific examples:

> In 2003, on July 6, 12, 13, 18, 19, 25, 26 and 31 and on August 1, 7, 8, 13, 14, 20, 21, 28 and 29, Sergeant Smith was scheduled to work the midnight shift. He did not work those nights because he had accumulated compensatory time working on computers as a special assignment.
>
> In 2003, on July 29 and 30 on August 5, 6, 18, 19, 22, 23, 25, 26 and 27, on September 1, 3, 4, 5, 16, 17, 18 and 19, and on October 13,

14, 15, 16, 21, 22, 23. another sergeant was on special assignment and unavailable to work his regular shift. The shift was without a sergeant and without experienced officers on August 29, on September 18 and 30 and on October 13, 14, 15, 22, 24, 25, 26 and 31, 2003.

23. Both Sergeant Smith and Sergeant Poliquin were assigned to assist Carl due to the backlog in the detective bureau, which removed them from some midnight shifts. Sergeant Poliquin was assigned to provide firearms training in addition to Officer Everett, although Officer Everett had provided that training in the past by himself and two firearms instructors were not needed. Sergeant Poliquin was also assigned to "Crime Suppression" by DeMarco.

24. As to training, DeMarco went to the FBI Academy which is located in Virginia. I know that Carr was sent for training in Florida, Pennsylvania and another location out west. My letter states that other officers only received "the minimum" amount of training. Based on my review of training records provided to me by Defendants, I now know that many officers in the EWPD did not even receive minimum required training. Not all of these training requirements are certified by POSTC More specifically, as of the time I wrote my letter, a number of police officers had not received training necessary to be certified as medical responders. These included the following:

Jay Drolett Expired 1-1-2005
Mathew Carl Expired 1-1-2000
Craig Browning Expired 1-11-2005
Jeffrey Reimer Expired 1-1-2005

Rafael Crespo Expired 4-1-2004
Jeffrey Capen Expired 1-1-2005

25. In addition, as of February 2005, no one in the EWPD had received OSHA mandated training in the following areas:

A. Emergency Action Plan
B. Hearing Conservation
C. Personal Protective Equipment
D. Respiratory Protection
E. Permit Required Confined Space Entry
F. Portable Fire Extinguisher
G. Hazard Communication
F. Bloodborne Pathogens
G. Signaling

26. Nor had members of the EWPD received mandatory training in many areas required under our EWPD Department Operational Directives ("DOD"). Such mandatory training includes bi-annual refresher courses in the use of the baton. See DOD Chapter 1, Sec. 5, at p. 4, Sec. A.8,attached as Exhibit G; training in use of defibrillator, see DOD, Chapter 41, Section 33, attached as Exhibit H; annual infectious disease training, see DOD, Chapter41, Section 14.V.A at p.3, attached as Exhibit I, as well as others. And as I mentioned above, only Officer Scavatto received needed training in how to use the traffic laser.

27. The statements in my letter about money spent for cars for the Chief and Carl are also true. Initially, EWPD received a quote in the amount of $18,185 for each new 2004 Ford Taurus, which included items necessary, for the cars to be outfitted for police administrative use. This would have resulted in an expenditure of $36,370 for two (2)

cars. Instead, the cars purchased cost a total of $43,450, because a decision was made by DeMarco to add tinted windows and remote car starters. See Exhibit J, attached (initial estimate and invoice after purchase.) The remote car starters were added after the fact. I know this because I accompanied Matt Carl to pick up the first car, and at that point they did not have remote starters. Carl then contacted DeMarco and arrangements were made to install remote starters when they returned to pick up a second car. Tinted windows and remote starters might be nice, but are less necessary than medical equipment for line cruisers.

28. At the same time that these additional funds were being spent, I had requested equipment for line cars, which was also purchased with funds from the capital improvement budget. I know that the expenditures for the Chief and Detective cars delayed my purchase of these needed items for line cruisers because Maria Root, DeMarco's administrative assistant, told me this. See Defendants' Statement of Undisputed Material Facts ("DMF") at para 114.

29. My statements about Matt Carl's failure to do his job are also true. It is undisputed that from October 2003 thru November 2004, Carl was unable to keep up with the workload in the Detective Bureau, that there were constant complaints from citizens and officers about this, and that police officers were reassigned from their patrol duties to assist Carl in completing his work. See Exhibit F and DeMarco Exhibit F, emails from DeMarco dated 10/29/03 and 12/10/04. In addition to the information recited above, I had other reasons for believing that

Carl was shirking his duties in the Detective Bureau, as discussed below.

30. The email dated 9/16/04, DeMarco Exhibit A, was sent by DeMarco to all personnel on the subject of "Rumors and Morale". At the time this message was sent, information had been circulating throughout the EWPD that Carl was having an affair with a college intern who was working in the EWPD, Laura Thompson. I did not initiate these discussions but I did hear other personnel state that they had directly observed or heard evidence of such behavior.

31. I can attest to the following of my own personal knowledge: Interns are students who work at the EWPD in order to acquire college credits. Interns are usually required to spend several hours a week participating in various police activities, and in my experience that is the amount of time they ordinarily spend at the EWPD. During 2003 - 2004, Laura began working at the EWPD as an intern, spending most of her time with Carl who was supervising her activities. Her status in the department was unusual for an intern, in that I observed her there on a daily basis, and saw that she had been provided access codes to the station door. I observed her riding with Carl in his cruiser and spending time with him in the evidence room on a regular basis, much more time than would typically be devoted by an intern. I also know that Carl divorced his wife and ultimately married Laura. I received an a-mail indicating that their child had been born approximately six months before I was forced to take administrative leave from the EWPD. I estimate that this email was sent approximately August 2005, although I do not have a copy in order

to confirm the date. Further, I know that after Laura left our internship program arrangements were made for two other students to serve as interns in the EWPD and I was informed that our department would no longer be participating in the program.

32. To my knowledge, no investigation of Carl's conduct with the intern was ever instituted. Instead, DeMarco devoted his energies to issuing emails such as DeMarco Exhibit A, and issuing a new DOD prohibiting "harassment", defined as "the spreading of libelous or slanderous statements", which prohibited "disparaging rumors". See DeMarco Exhibit B. Significantly, DeMarco defined libel in this directive as "a written or verbal statement of another that would give an unfavorable impression of another person". This definition does not require that a statement be false in order to constitute "libel". The directive defines "rumor" as "unauthenticated statements about another employee or person." Based on the facts cited above, it appears more likely than not that Carl's sexual involvement with Laura Thompson during the time she was an intern was, in fact, "authenticated."

33. Comments in my letter to the Commission about the "golden circle" are also true. As I use the term "golden circle", it refers to the fact that certain members of the department received favored treatment from DeMarco and his administration. These individuals are not subject to investigation, discipline or even criticism, even if complaints are made about them and the facts warrant such action. Yet any complaints or issues they raise, even if they meet DeMarco's definition of "rumor" or "libel" become the subject of e-mails, directives, investigations and/or discipline meted out to others.

Their version of events is accepted as true even if unsupported by fact or common sense. They receive praise and commendation which isn't warranted by their performance. They are favored in terms of job assignments and training.

Favoritism has permeated the EWPD during DeMarco's tenure. Long before I wrote my letter, the terminology "golden circle" was in use. Protecting Carl from "rumors" that turned out to be true, and providing him with extra staff to do work he should have been able to complete himself, are examples of DeMarco's favored treatment of a member of the "golden circle."

34. When Carl engaged in conduct which clearly constituted "harassment" under DeMarco's new DOD definition, Carl was allowed to continue such conduct with impunity even after discipline had allegedly been imposed. I witnessed this harassment first hand, as I was a recipient of a-mail messages sent by Carl which were inappropriate. Our dispatcher, Patricia Clynch complained directly to the Chief and asked that something be done about Carl's use of inappropriate language in emails. After he was disciplined for this conduct, he retaliated against Clynch by informing everyone who received his messages that he was excluding Ms. Clynch her from his email list, continuing his use of inappropriate language and insulting her. See Exhibit K, email from Patricia Clynch to DeMarco dated November 23, 2004 and attached emails.) This type of conduct by Carl, and DeMarco's lack of response to it are typical of treatment received by those in the "golden circle."

35. I was suspended for violating these policies prohibiting "libel" and "harassment." See Exhibit L, my letter of suspension. However, those in the "golden circle" were allowed to engage in such behavior with impunity. For instance, Officer McNiece had a "long conversation" with Sergeant Hannaford about me and also complained to Captain Duffy about me because I took issue with the condition of a K9 vehicle. See McNiece Exhibit A. These disparaging comments about me were not investigated. And Carl complained about Officer Everett behind his back, falsely suggesting he had failed to do his job properly. Although Everett complained to DeMarco, no investigation was conducted of Carl's conduct. See Exhibit Mt email from Everett to DeMarco dated 12/06/04.

36. The EWPD Police Manual, in effect since 1995 sets out official policies. Procedures and regulations of our department. The Manual contains 17 chapters. One of which addresses "Responsibility [Chain] of Command." That chapter is focused on the conduct of police business in the course of performing patrol duties, since it is in this context that chain of command has its primary importance and is related to the need to protect safety and welfare. See Exhibit N, EWPD Manual, Table of Contents and Chapter 5.0.0. Although it is my usual practice to follow the chain of command whenever possible in the course of performing my duties at the EWPD, I have witnessed, on a weekly, if not daily basis, numerous occasions on which the chain of command is not followed and no consequences are imposed. See, for example, McNiece Exhibit A, which documents Officer McNiece's discussion with other

supervisors about me, although I was his direct supervisor as to the matters discussed.

37. Chapter 4 of the EWPD Manual, "Department Organization" applies to members of the EWPD who are acting in the course of performing their police duties. See Exhibit N, Chapter 4.0.0. The Section of the Manual which addresses political activity, such as my communication to the Police Commission, only restricts "Political Activity *On Duty*". See Exhibit N, Section 14.06.00. The Manual provision which governs "public statements" only restricts statements made "on behalf of the Department". See Exhibit N, Section 14.07.00. It has always been my position that I have an absolute right to communicate to the Police Commission on matters of public importance as a taxpayer, resident and citizen. This is different than speaking as a police officer in the performance of my duties or on behalf of the EWPD as a spokesperson.

38. DeMarco claims that I was not assigned to work in the detective bureau because he "suspected" that I "had compromised a prior undercover sting investigation" because I had "poor investigation skills." See DeMarco Aff. at Para. 94. This suspicion was based on an unsubstantiated "rumor" started by Carl and unnamed others who told DeMarco that I had ruined an undercover investigation by discussing details of this operation publicly and in the presence of confidential informants. See DeMarco Aff. At Para. 96. I was never made aware of these allegations, never told that I was being investigated, never given a chance to defend myself against these rumors and never disciplined or counseled in any way. And apparently Carl and

unnamed others were not investigated for starting this rumor, notwithstanding DeMarco's policy. See DeMarco Exhibit B.

39. These accusations against me are entirely false. I recall an undercover drug operation in which Carl, Poloquin and Sgt. Smith were participants in 2004. The officers involved were just about to execute a search warrant when someone called in a "suspicious vehicle" parked near the location being investigated. The vehicle in question was an unmarked car in which Sgt. Poliquin and Sgt. Smith were sitting. In my view, this was the reason that no drugs were seized and the raid was unsuccessful.

40. I was unaware, until I read his affidavit, that Carl has had a "strained relationship" with me since 2004. Despite my concerns about his failure to perform his duties, I always treated Carl in a professional manner. This evidence shows that my letter to the Police Commission did not cause any rift between myself and Carl, as by his own admission it existed well before February 2005.

41. Carl's claim that he was "involved" in drafting no less than eighty (80) warrants in 2004 doesn't contradict the concerns raised in my letter. As a sergeant, I am "involved" in many warrants as well, since its my job to supervise patrol officers reporting to me, although I don't ordinarily execute warrants myself. And although DeMarco and Carl now state that as a detective, Carl does not execute warrants, DeMarco did not tell me this when I told him about my review of the arrest warrant log back in 2004. As of this date, I have since been provided with copies of computer...generated arrest warrant logs from June 2003 through February 2005 and

they show only one warrant attributed to documents and these also show only one arrest warrant on which Carl is listed as the "investigating officer". (I have not attached this document, Bates-stamped #1-22, because it has designated as "highly confidential" information by Defendants.)

42. If DeMarco was "incredulous" because I requested training opportunities, including bicycle training, this was an unreasonable reaction on his part Although I was injured while bicycling riding off duty, I continue to ride a bicycle to this day. DeMarco never directed me to submit a written "proposal" for bicycle training. My request for bicycle training was in writing, as were my requests for other training. I have long been a proponent of having police personnel patrol by bicycle in our town. I was unaware that DeMarco was responsible for denying me training opportunities, and assumed these were being handled by Sergeant Hannaford, Training Officer. At one point I utilized the chain of command, speaking to Captain Duffy because I thought that Hannaford was not assigning me to requested training. After I spoke with Captain Duffy, I thought the problem was resolved.

43. I was not upset when DeMarco refused to allow me to attend training; as set out in DeMarco Exhibit H. I sent this message to the captain and chief because I was required to send monthly reports on this topic those personnel. It was not sent "Department-wide". I thought it most efficient to forward DeMarco's e-mail to me in order to explain why no further reports would be forthcoming, as this set out his reasons for his decision to end my participation in the program.

44. There was no "disruption" caused by my sending the anonymous letter to the Police Commission. Indeed, by leaving my name off the letter and submitting it anonymously, I sought to minimize any possibility of disruption. I also excluded any reference to Carl's affair in my letter, even though DeMarco's protection of Carl, as described above, was a source of great disruption in the EWPD.

45. My letter did not cause disruption within the department. At the time I wrote my letter, the department lacked unity and morale was already quite low. Contrary to Defendants' arguments, there was already a pervasive feeling of separation between those who were favored by DeMarco and his administration and those who were considered part of that favored group. On a daily basis, those officers who were not favored felt that they were unable to question or comment on the actions of favored officers since to do so would result in retaliatory responses, if they were addressed at all.

46. In addition, the conduct of Carl in conducting investigations as well as his relationship with the intern was already the subject of discussion and discontent within the department. Patricia Clynch, a dispatcher. had informed DeMarco via a-mail dated December 23, 2004, that Carl believed himself to be "untouchable." Exhibit K.

47. DeMarco himself acknowledged the existing dissension and disruption caused by Carl's inaction and the reassignment of officers to complete investigations. Defendants' Exhibit F. In fact, he implored the department to "Get along. Change your

attitudes. Work together. Communicate. Lets change the way we do things at the EWPD."

48. To the extent any "disruption" resulted after I wrote my letter, this was due to the fact that DeMarco, Carl and their supporters did not want mismanagement and waste of resources to become public knowledge.

49. After I wrote the letter I was not distrusted by my colleagues. I continued to lead effectively and was never criticized for lacking the confidence or trust of the department. The proof of that comes from the fact that there was no reduction in my assignments or responsibilities or in those officers who were assigned to work for or with me. In fact, after I wrote the letter I was reassigned the additional responsibility of vehicle maintenance. Further, my performance evaluation raised no such problems with personal distrust except noting my suspension.

50. The alleged concern over further anonymous letters was not one generally shared within the department and was no more than an expression of concern by those officers who were already considered part of the favored group and would have the most to lose in the event that favoritism was ended.

51. My letter had a direct impact on Carl only in that it was an attempt to hold him and the department accountable to the community for concerns that had been frequently raised by department members, citizens and outside agencies. The only disruption coming from that effort were Carl's hurt feelings.

52. While Defendants claim that my letter caused disruption in that violations of department policy and the chain of command would allegedly be tolerated, the chain of command was already dysfunctional and broken and could not have been further impacted by my letter. Prior to the writing the letter, officers were already concerned that favored colleagues could do whatever they wanted without consequence with the additional concern that pointing out any problems would result in retaliation. The individuals within the "golden circle" existed outside the chain of command in the sense that they regularly bypassed the chain of command to get assignments or training they wanted. In addition, they were permitted to conduct themselves without fear of any consequence and can and did bring issues directly to DeMarco and others without concern for the chain of command. I had even raised that concern with DeMarco as far back as October 29, 2003 when I sent him an e-mail indicating that his style of leadership fostered direct communication rather than use of the chain of command. See e-mail dated October 29, 2003 attached hereto as Exhibit R.

53. In addition, there was no disruption caused by the internal affairs investigation into the letter. The investigation itself was ordered by DeMarco and I did not in any way impede it. Any disruption that happened is a consequence of DeMarco's decision to conduct the investigation and not anything that I or other officers did. My observation was that officers, other than those who were assigned to conduct the investigation, were not wasting time and energy accusing each other of writing the letter and were instead focused on their duties and responsibilities.

54. After I sent my letter criticizing training, DeMarco issued a new DOD governing training and career development. See Exhibit O, attached. This new directive expressly states that specialized/career development assignments are to be determined objectively. See Exhibit O, page 134

55. After I wrote my letter criticizing the excess spending of town money on the DeMarco and Carl vehicles, new rules were put in place to govern spending capital improvement money (cruiser purchases). Under these new rules, quotes for the entire price, as well as a sales agreement from the vendor, had to be produced before the first selectman would issue a purchase order. This new procedure allowed the town greater oversight over EWPD spending. See Exhibit P, attached.

56. The lack of experienced police officers, especially on the midnight shift, has been, and continues to be, an issue of public concern in the Town of East Windsor. See Exhibit Q, Minutes of Board of Finance and Police Commission Special Meeting, dated October 4, 2006 (revised).

57. Although Poliquin. Hannaford, and McNiece have all claimed that they had problems working with me after they learned that I had sent the letter to the Commission, it was not I who disclosed my identity, but rather DeMarco, who ordered that this issue be pursued by way of an internal investigation.

58. In addition, Hannaford disliked me well before I wrote my letter. He was my field training officer when I first came to the EWPD and prior to 1990, we got along well, After I was promoted to sergeant, our relationship deteriorated, perhaps because I was promoted before Hannaford despite

his greater seniority and his several unsuccessful attempts at promotion. On a number of occasions he became outraged in the course of our interactions and tried to engage me in screaming matches. On at least one occasion, I wrote the incident up to Captain Duffy and requested corrective action. Hannaford was the training officer at the time I wrote my letter. His failure to do his job properly resulted in several officers failing to maintain their medical certification, OSHA-mandated training and other training required by DODs.

59. Although Hannaford, McNiece and DeMarco have all claimed that officers lost confidence in DeMarco because I was not disciplined for violating the chain of command policy, this claimed reaction is not supported by the facts. First of all, as noted above, the "chain of command" is often ignored in our department without consequence. Second, a number of officers, including myself, had lost confidence in DeMarco's ability to run the department well before I wrote my letter. Third, although I was disciplined and retaliated against by Defendants after writing my letter, I experienced no difference in treatment from my subordinates or from other supervisors.

60. The Defendants' own submissions establish that I was disciplined not because of any disruption, but rather because I spoke on matters of public concern and the content of my speech offended DeMarco, Carl and others. Neither Hannaford's investigation of me, see DeMarco Exhibit J, nor the June 8, 2005 meeting of the Board of Police Commissioners which resulted in my discipline, see DeMarco Exhibit K, makes any reference to the fact that my comments have caused disruption in the

workplace. Instead, Defendants discuss the substance of my comments and point out that "one of the allegations is extremely offensive to one of the employees who works in this building and we have to remember that there is a victim here." DeMarco Exhibit K at p. 8. Defendants only claimed that I was disciplined because my letter disrupted the EWPD after I fifed this lawsuit, to try and excuse their behavior.

61. Based on my observations of DeMarco's demeanor and comments after my letter was sent to the Commission, it appeared that he was extremely angry about it, more interested in exacting vengeance than investigating and remedying the problems described in the letter. I did not voluntarily admit sending the letter because I was afraid that I would be retaliated against if DeMarco and his supporters discovered that I was its author. When the topic came up in a staff meeting, I did state that the author should have considered its potential negative impact on the police department's budget before sending the letter, in an effort to deflect attention from myself. As to DeMarco's later questioning of me, I believed, and still believe, that the EWPD did not have the right to bring me in to ask questions about writing my letter as it was off-duty conduct However, as soon as the internal investigation was commenced and I was ordered to answer the question, I did so truthfully.

62. When Defendants first issued my suspension, they suspended me for days other then those on my regular schedule. When this was discovered, the days of suspension were changed. I served the full ten day suspension without pay.

63. Discipline was not warranted in my case. My suspension had no "softening" effect upon the department, nor has it solved any potential disruption of the department. As a matter of fact, it has merely reinforced the feeling within the department that certain favored employees are "untouchable." It had also reinforced the belief that officers should not raise legitimate questions or concerns for fear of retaliation.

64. The foregoing is true and correct and based on my personal knowledge.

/s/ R. Jay Drolette

Subscribed and sworn to before me this 5th day of February, 2007.

/s/ Marc P. Mercier
Commissioner of Superior Court